

9-9-2011

# State Ex Rel. Wasden v. Native Wholesale Supply Clerk's Record v. 1 Dckt. 38780

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs- Respondents,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants-Appellants.

Supreme Court Case No. 38780

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE TIMOTHY HANSEN

SAMUEL A. DIDDLE

ATTORNEY FOR APPELLANT

BOISE, IDAHO

BRETT T. DELANGE;

WILLIAM VON TAGEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
8/14/2008	NCOC	CCGARDAL	New Case Filed - Other Claims
	COMP	CCGARDAL	Complaint Filed
	SMFI	CCGARDAL	Summons Filed
8/29/2008	AFOS	CCTOWNRD	Affidavit Of Service by Mail
9/17/2008	NOTC	CCMAXWSL	Notice of Removal of Case to Federal Court
4/7/2009	MISC	CCGARDAL	Remanded from Federal Court
	MEMO	CCGARDAL	Memorandum Decision and order
4/9/2009	MOTN	CCNELSRF	Plaintiffs State of Idaho and the Idaho State Tax Commissions Motion for A Preliminary Injunction
	MEMO	CCNELSRF	Plaintiffs State of Idaho and the Idaho State Tax Commissions Memorandum in Support of Motion for A Preliminary Injunction
	AFFD	CCNELSRF	Affidavit of Don Anderson
	AFFD	CCNELSRF	Affidavit of Beth Kittelmann
	NOTS	CCNELSRF	Notice Of Service
4/15/2009	NOHG	CCTOWNRD	Notice Of Hearing
	HRSC	CCTOWNRD	Hearing Scheduled (Motion 05/21/2009 04:00 PM) Motion for Preliminary Injunction
5/6/2009	MOTN	MCBIEHKJ	Motion for Continuation of Hearing on Motion for Preliminary Injunction
	MOTN	MCBIEHKJ	Motion for Protective Order
	MOTN	MCBIEHKJ	Motion to Dismiss for Lack of Personal Jurisdiction
	MEMO	MCBIEHKJ	Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction
	AFFD	MCBIEHKJ	Affidavit of Arthur Montour in Support of Motion to Dismiss
5/12/2009	NOTS	CCWRIGRM	Notice Of Service
	OBJT	CCWRIGRM	Defendants Objection to Plaintiffs Motion for Award of Attorneys Fees
5/18/2009	NOHG	CCHOLMEE	Amended Notice Of Hearing Re: Motion for Preliminary Injunction & Motion to Dismiss 7.2.09@3:30PM
	HRSC	CCHOLMEE	Hearing Scheduled (Motion 07/02/2009 03:30 PM) Motion for Preliminary Injunction & Motion to Dismiss
5/19/2009	HRVC	DCOLSOMA	Hearing result for Motion held on 05/21/2009 04:00 PM: Hearing Vacated Motion for Preliminary Injunction
6/1/2009	NOTS	CCLYKEAL	Notice Of Service
6/10/2009	MOTN	CCTOWNRD	Plaintiffs State of Idaho and Idaho State Tax Commission's Motion to File Separate Briefings
6/23/2009	MEMO	MCBIEHKJ	Memorandum in Opposition to Motion to Dismiss

State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
6/23/2009	MEMO	MCBIEHKJ	Memorandum in Opposition to Motion to Dismiss
	AFFD	MCBIEHKJ	Affidavit of Mark Ausman
	AFFD	MCBIEHKJ	Second Affidavit of Beth A Kittlemann
6/24/2009	ORDR	DCELLISJ	Order Granting Pl's State of ID State Tax Comm. Motion to File Separate Briefings
6/25/2009	MEMO	MCBIEHKJ	Memorandum in Response to Motion for Preliminary Injunction
7/1/2009	REPL	CCANDEJD	Plaintiff's Reply Memo in Support
	MOTN	CCANDEJD	Motion to Strike the Second Affd of Beth Kittlemann
	REPL	CCANDEJD	Reply to PL's Memo in Opposition
	AFFD	CCANDEJD	Affidavit in Support of Motion to Dismiss
	REPL	CCANDEJD	Reply to PL's Memo in Opposition
	MEMO	CCAMESLC	Memorandum in Opposition to Motion to Strike
7/2/2009	DPHR	DCOATMAD	Hearing result for Motion held on 07/02/2009 03:30 PM: Disposition With Hearing Motion for Preliminary Injunction & Motion to Dismiss
7/10/2009	MEMO	CCAMESLC	Memorandum in Opposition to Motion to Dismiss
	MEMO	MCBIEHKJ	Supplemental Memorandum
8/26/2009	MISC	MCBIEHKJ	Filing of Supplemental Authority
9/15/2009	ORDR	DCHOPPKK	Order
9/29/2009	MEMO	CCPRICDL	Memorandum Regarding Supplemental Authority
	AFFD	CCPRICDL	Affidavit of Samuel A Diddle
10/13/2009	MEMO	CCDWONCP	Plaintiffs State of Idaho and Idaho State Tax Commission's Second Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss
10/23/2009	REPL	MCBIEHKJ	Response to Second Supplemental Memo in Opposition to Motion to Dismiss
12/8/2009	HRSC	DCOLSOMA	Hearing Scheduled (Hearing Scheduled 12/17/2009 09:00 AM)
12/17/2009	DCHH	DCOLSOMA	Hearing result for Hearing Scheduled held on 12/17/2009 09:00 AM: District Court Hearing Held Court Reporter: V.Gosney Number of Transcript Pages for this hearing estimated: less than 100
2/22/2010	MEMO	CCWRIGRM	Defendants Supplemental Memorandum of Law in Support of Motion to Dismiss and in Opposition to Plaintiffs Motion for Preliminary Injunction
	AFFD	CCWRIGRM	Affidavit of Samuel A Diddle in Support of Supplemental Memorandum
3/4/2010	MEMO	CCGARDAL	Plaintiff State of Idaho and the Idaho tax Commission's Third memorandum in Opposition to Motion to Dismiss



State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
3/9/2010	NOSC	CCGARDAL	Notice Of Substitution Of Counsel (Von Tagen for Spangler)
3/11/2010	REPL	CCSULLJA	Supplemental Reply Memorandum in Support of its Motion to Dismiss and in Opposition to Motion for a Preliminary Injunction
3/18/2010	NOTC	CCWRIGRM	Plaintiffs State of Idaho and Idaho State Tax Commissions Notice of Supplemental Authority
5/20/2010	MEMO	DCHOPPKK	Memorandum Decision and Order Regarding Defendant's Motion to Dismiss
6/3/2010	MOTN	CCSULLJA	Motion for Stay of Enforcement of the May 20, 2010 Memorandum, Decision and Order (Oral Argument Requested)
	MEMO	CCSULLJA	Memorandum in Support of Motion for Stay Enforcement of the May 20, 2010 Memorandum, Decision and Order
	MOTN	CCSULLJA	Motion for Permission to Appeal May 20, 2010 Memorandum Decision and Order (Oral Argument Requested)
	MEMO	CCSULLJA	Memorandum in Support of Motion for Permission to Appeal
	NOHG	CCSULLJA	Notice Of Hearing
	HRSC	CCSULLJA	Hearing Scheduled (Hearing Scheduled 08/09/2010 03:00 PM) Motion for Appeal of the Court's May 20, 2010 Memorandum, Decision and Order
6/4/2010	OBJT	CCDWONCP	Defendant's Objection to Proposed Preliminary Injunction Order
6/24/2010	MOTN	CCGARDAL	Motion for Summary Judgment
	AFFD	CCGARDAL	Third Affidavit of Beth A Kittelmann
	MEMO	CCGARDAL	Memorandum in Support of their Motion
	OBJT	CCGARDAL	Objection to Motion for Permission to Appeal and Stay Enforcement
6/28/2010	AMEN	CCCHILER	Amended Notice of Hearing: Motion for Appeal (8/24/10 @ 4pm)
	HRSC	CCCHILER	Hearing Scheduled (Motion 08/24/2010 04:00 PM) Motion for Appeal of the Court's May 20, 2010 Memorandum, Decision and Order
	HRVC	CCCHILER	Hearing result for Hearing Scheduled held on 08/09/2010 03:00 PM: Hearing Vacated Motion for Appeal of the Court's May 20, 2010 Memorandum, Decision and Order
7/13/2010	NOTS	CCSIMMSM	Notice Of Service
8/3/2010	MOTN	CCWRIGRM	Plaintiffs State of Idaho and Idaho State Tax Commissions Motion to Compel
	AFFD	CCWRIGRM	Affidavit of Brett T Delange
	MEMO	CCWRIGRM	Memorandum in Support of Motion to Compel

State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
8/9/2010	HRSC	DCOLSOMA	Hearing Scheduled (Motion for Summary Judgment 10/26/2010 03:00 PM)
8/10/2010	NOTH	CCWRIGRM	Notice Of Hearing (08/24/10)
	NOTH	CCWRIGRM	Notice Of Hearing (10/26/10)
	HRSC	CCWRIGRM	Hearing Scheduled (Hearing Scheduled 08/24/2010 04:00 PM) Motion to Comopel
8/20/2010	REPL	CCSWEECE	Reply Memorandum In Support Of Motion For Permission To Appeal The Court's Memorandum
8/24/2010	HRVC	DCOLSOMA	Hearing result for Hearing Scheduled held on 08/24/2010 04:00 PM: Hearing Vacated Motion to Comopel
	DCHH	DCOLSOMA	Hearing result for Motion held on 08/24/2010 04:00 PM: District Court Hearing Held Court Reporter: V. Gosney Number of Transcript Pages for this hearing estimated: Motion for Appeal of the Court's May 20, 2010 Memorandum, Decision and Order - less than 100
8/31/2010	STIP	CCCHILER	Stipulation to Modify Briefing Deadlines
9/7/2010	TRAN	DCDANSEL	Transcript Filed - 08-24-10
9/14/2010	ORDR	DCOLSOMA	Order Overruling Defendant's Objections to Proposed Preliminary Injunction Order and Denying Defendant's Motions: (1) for Permission to Appeal May 20, 2010 Memorandum Decision and Order; and (2) for Stay of May 20, 2010 Memorandum Decision and Order
9/24/2010	NOTS	CCLUNDMJ	Notice Of Service
9/27/2010	ORDR	DCELLISJ	Order Modifying Briefing Deadlines
	NOTS	CCSULLJA	Notice Of Service
9/30/2010	MEMO	CCCHILER	Defendant's Memorandum of Law in Support of its Opposition to Plaintiffs' Motion for Summary Judgment
	AFFD	CCCHILER	Affidavit of Samuel A Diddle in Support of Opposition to Plaintiffs' Motion for Summary Judgment
10/19/2010	REPL	MCBIEHKJ	Reply Memorandum in Support of Motion for Summary Judgment
	AFFD	MCBIEHKJ	Fourth Affidavit of Beth A Kittlemen
10/26/2010	DCHH	DCOLSOMA	Hearing result for Motion for Summary Judgment held on 10/26/2010 03:00 PM: District Court Hearing Held Court Reporter: V. Gosney Number of Transcript Pages for this hearing estimated: less than 100
11/26/2010	MEMO	DCHOPPKK	Memorandum Decision and Order
12/10/2010	MOTN	CCSIMMSM	Motion for Reconsideration of A Portion of Memorandum Decision and Order of 11-26-10

State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
12/10/2010	ANSW	CCAMESLC	Answer (Diddle for Native Wholesale)
12/13/2010	ORDR	CCCHILER	Permanent Injunction Order
12/16/2010	NOHG	CCLATICJ	Notice Of Hearing re Motion for Reconsideration of a Portion of Memorandum Decision and Order of November 26, 2010 (02/08/11 @ 3 pm)
	HRSC	CCLATICJ	Hearing Scheduled (Motion 02/08/2011 03:00 PM) Motion for Reconsideration of a Portion of Memorandum Decision and Order of November 26, 2010
12/29/2010	MOTN	CCRANDJD	Motion to Deny Defendants Jury Demand
	AFFD	CCRANDJD	Affidavit of Roderick Howard
	MEMO	CCRANDJD	Memorandum in Support of Motion for Civil Penalties
	MEMO	CCRANDJD	Memorandum in Opposition to Motion to Reconsider and in Support of Motion to Deny Jury Demand
	NOHG	CCRANDJD	Notice Of Hearing re Motion to Deny Jury Demand (2.8.11@3:30pm)
	HRSC	CCRANDJD	Hearing Scheduled (Motion 02/08/2011 03:30 PM) Motion to Deny Defendants Jury Demand
1/10/2011	MOTN	MCBIEHKJ	Motion to Vacate Hearing or Request for Status Conference
1/13/2011	NOHG	CCGARDAL	Notice Of Telephonic Status Conference 2.18.11 @ 2:30 pm
	HRSC	CCGARDAL	Hearing Scheduled (Status 02/18/2011 02:30 PM) telephonic
	CONT	DCOLSOMA	Continued (Status 01/18/2011 02:30 PM) telephonic
	MEMO	CCSULLJA	Plaintiffs' Memorandum in Opoosition to Defendant's Motion to Vacate Hearing
	NTCH	CCSWEECE	Amended Notice Of Telephonic Conference Hearing (01-18-11 @ 2:30 pm)
1/14/2011	MEMO	CCMASTLW	Memorandum in Reponse to Opposition to Motion to Vacate Hearing Date
1/18/2011	NOHG	CCLATICJ	Notice of Hearing on Defendant's Motion to Vacate Hearing (01/18/11 @ 2:30 pm)
	DCHH	DCOLSOMA	Hearing result for Status held on 01/18/2011 02:30 PM: District Court Hearing Held Court Reporter: V. Gosney Number of Transcript Pages for this hearing estimated: telephonic - Defendant's Motion to Vacate Hearing - less than 100
	HRSC	DCOLSOMA	Hearing Scheduled (Motion 01/31/2011 02:00 PM)
1/19/2011	NOTC	CCHOLMEE	Notice of Appeal

State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
1/25/2011	MEMO	MCBIEHKJ	Memorandum in Reply to Opposition to Motion to Reconsider and in Opposition to Motion to Deny Timothy Hansen
1/31/2011	DCHH	DCOLSOMA	Hearing result for Motion held on 01/31/2011 02:00 PM: District Court Hearing Held Court Reporter: V. Gosney Number of Transcript Pages for this hearing estimated: less than 100 Timothy Hansen
2/1/2011	MEMO	CCMASTLW	Memorandum in Opposition to Motion for Civil Penalties Timothy Hansen
	AFFD	CCMASTLW	Affidavit of Samuel A. Diddle Timothy Hansen
2/7/2011	MEMO	DCHOPPKK	Memorandum Decision and Order on Defendant's Motion for Reconsideration Timothy Hansen
2/8/2011	DCHH	DCOLSOMA	Hearing result for Motion held on 02/08/2011 03:30 PM: District Court Hearing Held Court Reporter: V. Gosney Number of Transcript Pages for this hearing estimated: less than 100 Timothy Hansen
3/9/2011	MEMO	DCHOPPKK	Memorandum Decision and Order on Civil Penalty Timothy Hansen
3/31/2011	JDMT	DCOLSOMA	Judgment Timothy Hansen
	CDIS	DCOLSOMA	Civil Disposition entered for: Native Wholesale Supply Company, Defendant; Idaho State Tax Commission, Plaintiff; State of Idaho, Plaintiff. Filing date: 3/31/2011 Timothy Hansen
	STAT	DCOLSOMA	STATUS CHANGED: Closed Timothy Hansen
4/14/2011	MEMC	CCWRIGRM	Memorandum Of Costs And Attorney Fees Timothy Hansen
	AFFD	CCWRIGRM	Affidavit in Support of Memorandum Timothy Hansen
4/15/2011	REMT	CCSIMMSM	Remittitur - Dismissed - Supreme Court Docket No. 38465 Timothy Hansen
4/28/2011	OBJC	CCSWEECE	Objection To Memorandum Of Costs And Attorneys Fees Timothy Hansen
5/4/2011	MEMO	CCWRIGRM	Reply Memorandum in Support of an Award of Costs and Attorney Fees Timothy Hansen
	NOTH	CCWRIGRM	Notice Of Hearing (06/02/11 @ 3:00pm) Timothy Hansen
	HRSC	CCWRIGRM	Hearing Scheduled (Hearing Scheduled 06/02/2011 03:00 PM) Costs and Attorney Fees Timothy Hansen
	STAT	CCWRIGRM	STATUS CHANGED: Closed pending clerk action Timothy Hansen
5/5/2011		CCLUNDMJ	Notice of Appeal (Diddle for: Native Wholesale Supply Company (defendant) Timothy Hansen
5/11/2011	HRVC	CCNELSRF	Hearing result for Hearing Scheduled held on 06/02/2011 03:00 PM: Hearing Vacated Costs and Attorney Fees Timothy Hansen
	HRSC	CCNELSRF	Hearing Scheduled (Hearing Scheduled 06/14/2011 03:00 PM) (Amended) Cost and Fees Timothy Hansen

Date: 8/8/2011

**Fourth Judicial District Court - Ada County**

User: CCTHIEBJ

Time: 04:38 PM

ROA Report

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Case: CV-OC-2008-15228 Current Judge: Timothy Hansen

State of Idaho, etal. vs. Native Wholesale Supply Company

State of Idaho, Idaho State Tax Commission vs. Native Wholesale Supply Company

Date	Code	User	Judge
6/14/2011	DCHH	DCOLSOMA	Hearing result for Hearing Scheduled held on 06/14/2011 03:00 PM: District Court Hearing Held Court Reporter: V. Gosney Number of Transcript Pages for this hearing estimated: (Amended) Cost and Fees - less than 100 Timothy Hansen
8/1/2011	MEMO	DCHOPPKK	Memorandum Decision and Order on Costs and Attorneys Fees Timothy Hansen
8/8/2011	NOTC	CCTHIEBJ	Notice Of Transcript Lodged - Supreme Court Docket No. 38780 Timothy Hansen

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AUG 14 2003

J. DAVID NAVARRO Clerk  
By A. GARDEN  
DEPUTY

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State St., Lower Level  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**Attorneys for the State of Idaho**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No.**

**CV 00 0815228**

**VERIFIED  
COMPLAINT**

**BACKGROUND—Applicable Idaho Tobacco Laws**

1. In 1999, the Idaho Legislature found that cigarette smoking presents serious public health concerns to the State of Idaho and to Idaho citizens. Idaho Code § 39-7801(a). Indeed, the Legislature has determined that “[t]obacco is the number one killer in Idaho causing more deaths by far than alcohol, illegal drugs, car crashes, homicides, suicides, fires and AIDS combined,” and that tobacco usage is “the single most preventable cause of death and disability in Idaho.” Idaho Code § 39-5701.

2. Noting that the Surgeon General of the United States has also determined that smoking causes lung cancer, heart disease and other serious diseases, the Idaho Legislature

found that cigarette smoking presents serious financial concerns for the State of Idaho. Under certain health-care programs, the State may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance. Idaho Code § 39-7801 (a) and (b). Under these programs, the Legislature found, the State pays millions of dollars each year to provide medical assistance to persons for health conditions associated with cigarette smoking. Idaho Code § 39-7801(c).

3. The Legislature further determined that the financial burdens imposed on the State by cigarette smoking should be borne by tobacco product manufacturers, rather than by the State, to the extent that such manufacturers either determine to enter into settlement agreements with the State or are found culpable by the courts. Idaho Code § 39-7801(d).

4. On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the State of Idaho. The Master Settlement Agreement obligates these manufacturers to pay substantial sums to the State (tied in part to their volume of sales); to fund a national foundation devoted to the pursuit of public health interests; and to make substantial changes in their advertising and marketing practices and corporate culture with the intention of reducing underage smoking. Idaho Code § 39-7801(e).

5. Promptly thereafter, the Idaho Legislature declared that it would be contrary to the policy of the State of Idaho if tobacco product manufacturers could determine not to enter into such a settlement agreement (nonparticipating tobacco product manufacturers) and thereby use the resulting cost advantage to derive large profits in the years before liability may arise, without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. This legislative determination was driven, in part, by the fact that many diseases caused by tobacco usage often do not appear until many years after the affected individual begins smoking. Idaho Code § 39-7801(a) and (f).

6. The Idaho Legislature thus determined that it is in the interest of the State of Idaho to require that nonparticipating tobacco product manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. Idaho Code § 39-7801(f).

7. Accordingly, shortly after the Master Settlement Agreement was signed, the Idaho Legislature passed the Idaho Tobacco Master Settlement Agreement Act (the Master Settlement Agreement Act). In essence, the Master Settlement Agreement Act requires “tobacco product manufacturers” to either: (1) “[b]ecome a participating manufacturer (as that term is defined in Section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement,” or (2) place into a qualified escrow fund the amounts required by Idaho Code Section 39-7803(b)(1) of the Master Settlement Agreement Act.

8. In 2003, the Idaho Legislature decided that violations of the Master Settlement Agreement Act threatened not only the integrity of Idaho’s agreement with the tobacco companies, but also the fiscal soundness of the state and public health and responded with procedural enhancements to help prevent such violations through adoption of the Idaho Tobacco Master Settlement Agreement Complementary Act (the Complementary Act), codified at Title 39, Chapter 84, Idaho Code. Idaho Code § 39-8401. Idaho Code Section 39-8403(3) of the Complementary Act, in part, makes it unlawful for any person to sell, offer or possess, acquire, hold, own, import, or cause to import for sale or distribution in Idaho cigarettes of a tobacco product manufacturer or brand family not included on Idaho’s Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho Compliant Tobacco Manufacturer Directory).

9. At all relevant times, the Idaho Legislature has required any person who sells cigarettes to another wholesaler or to retailers for the purpose of resale to obtain from the Idaho State Tax Commission a cigarette permit, pursuant to Title 63, Chapter 25, Idaho Code.



10. Idaho law also provides that violations of the Complementary Act also constitute unfair trade practices in violation of the Idaho Consumer Protection Act (Consumer Protection Act). Idaho Code § 39-8406(5).

### **BACKGROUND—Native Wholesale Supply Company Violations**

11. This lawsuit is being filed because Defendant Native Wholesale Supply Company (Native Wholesale) has sold millions of cigarettes in violation of the Idaho laws mentioned above. Despite having been warned in writing of these multiple and various violations of Idaho law, Native Wholesale has continued to ignore and act in defiance of these laws. These unlawful actions, spelled out below, undermine and undercut the Idaho Legislature's stated goals and concerns with respect to tobacco sales and usage.

12. Specifically, since January 2004, Native Wholesale has sold at wholesale over 90 million cigarettes to retailers in Idaho without obtaining the permit required by Idaho's cigarette tax laws in chapter 25, Title 63, Idaho Code.

13. Furthermore, all of these cigarette sales are of brand families and of manufacturers that are not and have never been on the Idaho Compliant Tobacco Manufacturer Directory.

14. Given Native Wholesale's decision to continue to sell cigarettes in violation of Idaho law after having been apprised in writing of the Idaho laws being violated, Native Wholesale will continue to violate Idaho law and undermine Idaho's stated goals and policies related to tobacco usage and sales until it is stopped and deterred.

15. Native Wholesale's actions also violate an injunction issued by the District Court in and for the Fourth Judicial District, Ada County, that enjoins Canadian tobacco products manufacturer Grand River Enterprises Six Nations (Grand River) from selling any cigarettes in Idaho "whether directly or through a distributor, retailer or similar intermediary or intermediaries," because with knowledge of this injunction Native Wholesale has acted as an

agent or intermediary for Grand River and aided and abetted Grand River in the sale of cigarettes in Idaho.

### **JURISDICTION—Subject Matter Jurisdiction**

16. This Court has subject matter jurisdiction over the parties and this matter pursuant to the Complementary Act, the Consumer Protection Act, and the cigarette tax laws in chapter 25, Title 63, Idaho Code.

### **JURISDICTION—Personal Jurisdiction**

17. Pursuant to Idaho Code Section 5-514, the Complementary Act, the Consumer Protection Act, and the cigarette tax laws in chapter 25, Title 63, Idaho Code, this Court has personal jurisdiction over Defendant Native Wholesale.

18. Specifically, for purposes of Idaho Code Section 5-514, Defendant Native Wholesale is a corporation that has sold, offered for sale, imported, caused to be imported, and profited from the sale of, over 90 million cigarettes to persons within the state of Idaho, thus transacting business within this State and purposely and voluntarily availing itself of the privilege of conducting activities within the state of Idaho.

19. For purposes of the Complementary Act, Defendant Native Wholesale is a person that has sold or offered for sale over 90 million cigarettes of tobacco product manufacturers or brand families not included on Idaho's Compliant Tobacco Manufacturer Directory.

20. For purposes of the Consumer Protection Act, Defendant Native Wholesale is a person that has engaged in trade and commerce and committed acts declared by Idaho law to constitute unfair and deceptive trade practices under the Consumer Protection Act.

21. For purposes of the cigarette tax laws in chapter 25, Title 63, Idaho Code, Defendant Native Wholesale has sold, or distributed for sale, over 90 million cigarettes at wholesale to Idaho retailers.

## **PARTIES**

22. Lawrence G. Wasden is the Attorney General of the State of Idaho. He is authorized, and has the duty, pursuant to Idaho Code Sections 39-8406, and 39-8407 of the Complementary Act, to investigate and prosecute violations of the Act on behalf of the State of Idaho. Violations of the Complementary Act are also deemed unfair trade practices under the Consumer Protection Act. Idaho Code § 38-8406(5). Attorney General Wasden is authorized, and has the duty, pursuant to Idaho Code Section 48-606, to enforce the terms of the Consumer Protection Act.

23. The Idaho State Tax Commission, established by Idaho Code Section 63-101(2), is the constitutional tax commission prescribed in section 12, article VII of the constitution of the State of Idaho. It is authorized, and has the duty, pursuant to Idaho Code Sections 63-105 and 63-2519 to investigate, prosecute and enjoin violations of the cigarette tax laws in chapter 25, Title 63, Idaho Code.

24. Upon information and belief, Defendant Native Wholesale is a closely held corporation chartered by the Sac and Fox Tribe of Oklahoma. Native Wholesale has its principal place of business in the state of New York.

25. The true names and capacities of defendants sued in this Verified Complaint under the fictitious names of Does 1 through 20 are unknown to the Plaintiffs at this time. Plaintiffs will amend this Verified Complaint to show the true names of each when this has been ascertained. Defendants sued herein as Does 1 through 20 are, at all relevant times, engaged with Defendant Native Wholesale in the activities and conduct complained of in this Verified Complaint.

26. Whenever reference is made in this Verified Complaint to any act of Defendant Native Wholesale, such allegations shall mean Native Wholesale, through its agents, employees, or representatives, did or authorized such acts while actively engaged in the management, direction or control of the affairs of Native Wholesale's cigarette importing and wholesale business while acting within the scope and course of their duties.

## VENUE

27. Because Defendant Native Wholesale is a non-resident of the State of Idaho, venue is proper in this Court pursuant to Idaho Code Section 5-404 and Idaho Code Section 48-606(2) of the Consumer Protection Act.

## VIOLATIONS OF IDAHO LAW—Complementary Act

28. Since at least January 1, 2004, Defendant Native Wholesale has acquired, held, owned, possessed, transported, imported and/or caused to be imported for sale and distribution in Idaho large numbers of cigarettes. None of the cigarettes sold nor the cigarette's manufacturer has ever been listed on the Idaho Compliant Tobacco Manufacturer Directory.

29. Specifically, Defendant Native Wholesale acquired, held, owned, possessed, transported, imported and/or caused to be imported for sale and distribution in Idaho Seneca and Opal brand family cigarettes manufactured by Grand River. The cigarettes at issue were shipped, imported, or caused to be imported from the Nevada International Trade Corporation, a Foreign Trade Zone located in Las Vegas, Nevada, and sold to retail outlets located in the State of Idaho for sale in Idaho.

30. During the past four calendar years, Defendant Native Wholesale acquired, held, owned, possessed, transported, imported and/or caused to be imported for sale and distribution in Idaho to Idaho retailers at least the following amounts of Seneca and Opal brand cigarettes manufactured by Grand River:

2004:	24,650,000
2005:	18,258,000
2006:	21,270,000
2007:	20,932,000
2008 to date:	5,836,000

31. Since the inception of the Idaho Compliant Tobacco Manufacturer Directory in 2003, the Seneca brand of cigarettes has never been listed in the Directory.

32. Since the inception of the Idaho Compliant Tobacco Manufacturer Directory in 2003, the Opal brand of cigarettes has never been listed in the Directory.

33. Since the inception of the Idaho Compliant Tobacco Manufacturer Directory in 2003, Grand River, the manufacturer of the Seneca and Opal cigarettes brands, has never been listed in the Directory.

34. By its foregoing actions, Defendant Native Wholesale has violated Idaho Code Section 39-8403(3)(c) of the Complementary Act.

35. On September 5, 2002 the Fourth Judicial Court, Ada County in case number CV OC 0205249M, entitled State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises, entered judgment, in part, enjoining Grand River from selling any cigarettes in Idaho “whether directly or through a distributor, retailer or similar intermediary or intermediaries” until Grand River takes steps to comply with Idaho law, including establishing a qualified escrow fund (as defined by Idaho Code Section 39-7802(f) of the Master Settlement Agreement Act) and certifying its compliance to the Attorney General, neither of which Grand River has done.

36. On June 5, 2008, the Idaho Attorney General’s Office mailed a letter, certified mail, return receipt requested, to the president of Defendant Native Wholesale, Arthur Montour. The letter was sent to Native Wholesale’s mailing and street addresses. A true and correct copy of this letter and of the return receipts, signed on June 9 and 10, 2008, are attached to this Verified Complaint as Exhibit A and incorporated in this Verified Complaint as though fully set forth. Among other things the letter informs Native Wholesale of the Complementary Act and of the injunction described in paragraph 35, and asks Native Wholesale to cease its sales and shipping of Grand River cigarettes to Idaho retailers. The letter asks Native Wholesale to confirm its compliance with this request.

37. Despite receiving the letter described in paragraph 36, Defendant Native Wholesale has continued to acquire, hold, own, possess, transport, import and/or cause to be imported for sale and distribution in Idaho Seneca and Opal brand cigarettes, in knowing

violation of the injunction described in paragraph 34 and that such sales and shipments violate the Complementary Act. Specifically, on June 13, 2008, Native Wholesale imported and/or caused to be imported for sale and distribution into Idaho 1,460,000 Seneca and Opal brand cigarettes manufactured by Grand River. On July 21, 2008, Native Wholesale imported and/or caused to be imported for sale and distribution into Idaho 1,634,000 Seneca and Opal brand cigarettes manufactured by Grand River.

38. The State is informed and believes and on that basis alleges that since at least January 1, 2004, Defendant Native Wholesale and Grand River have operated under an agreement or business arrangement by which Native Wholesale imports into the United States and distributes to persons or businesses operating on Indian land in Idaho and other states cigarettes manufactured by Grand River.

#### **VIOLATIONS OF IDAHO LAW—Consumer Protection Act**

39. By its foregoing actions, Defendant Native Wholesale's violations of the Complementary Act constitute unfair and deceptive trade practice in violation of the Idaho Consumer Protection Act, Chapter 6, Title 48, of the Idaho Code.

#### **VIOLATIONS OF IDAHO LAW—Cigarette Tax Laws.**

40. Since January 2004, Defendant Native Wholesale's sales of 90 million cigarettes has been to Idaho retailers for purposes of resale.

41. At no time has Defendant Native Wholesale applied for nor possessed a cigarette permit as required by Idaho Code Section 63-2503(1).

42. By its foregoing actions, Defendant Native Wholesale has violated Idaho Code Section 63-2503(1).

#### **FIRST CAUSE OF ACTION—Idaho Complementary Act**

43. The State incorporates by reference the allegations contained in the preceding paragraphs.

44. Defendant Native Wholesale Supply Company was notified in writing of its responsibilities as a seller of cigarettes under the Complementary Act. Specifically, Native

Wholesale was advised, in part, that the Complementary Act prohibits transporting, importing, or causing to be imported cigarettes that are not included on the Idaho Compliant Tobacco Manufacturer Directory. Despite receiving such notice, Native Wholesale has declined to stop its illegal sales into Idaho and continues to violate the Complementary Act's provisions by selling cigarette brand families manufactured by tobacco product manufacturers that are not included on the Idaho Compliant Tobacco Manufacturer Directory. Native Wholesale's tobacco sales of cigarettes of tobacco product manufacturers or brand families that are not included on the Idaho Compliant Tobacco Manufacturer Directory violate Idaho Code Section 39-8403(3) of the Complementary Act.

45. Idaho Code Section 39-8406(1) of the Complementary Act states that each sale or offer to sell of a cigarette in violation of Idaho Code Section 39-8403(3) of that Act constitutes a separate violation and provides that each sale or offer to sell, and each cigarette possessed in violation of Section 39-8403(3), shall constitute a separate violation. For each violation, the Court may impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or five thousand dollars (\$5,000) upon a determination of violation of Section 39-8403(3).

#### **SECOND CAUSE OF ACTION—Idaho Consumer Protection Act**

46. The State incorporates by reference the allegations contained in the preceding paragraphs.

47. By its foregoing actions, Defendant Native Wholesale Supply Company's violations of the Complementary Act constitute unfair and deceptive trade practices in violation of the Idaho Consumer Protection Act, Chapter 6, Title 48, of the Idaho Code.

48. Idaho Code Sections 48-606 and 48-607 of the Consumer Protection Act state, in part, that for acts declared violations of the Consumer Protection Act, the Attorney General may seek, and the Court may:

- A. Declare that the method, act or practice at issue violated the Consumer Protection Act.

- B. Enjoin any method, act, or practice that violates the Consumer Protection Act.
- C. Assess a civil penalty in an amount up to \$5,000 per violation of the provisions of the Consumer Protection Act.
- D. Award the Attorney General reasonable expenses, investigative cost and attorney fees.

### **THIRD CAUSE OF ACTION—Idaho Cigarette Tax Laws**

49. The Tax Commission incorporates by reference the allegations contained in the preceding paragraphs.

50. Defendant Native Wholesale Supply Company has sold over 90 million cigarettes to Idaho retailers for purposes of resale without applying for nor possessing a cigarette permit as required by Idaho Code Section 63-2503(1).

51. By its foregoing actions, Defendant Native Wholesale has violated Idaho Code Section 63-2503(1).

52. Idaho Code Section 63-2519 authorizes the Tax Commission to seek and the Court to enjoin the continuance of the business of such person operating in violation of Idaho Code Section 63-2503(1).

### **REQUEST FOR RELIEF**

I. The State respectfully asks that this Court:

1. Find that Defendant Native Wholesale Supply Company has violated Idaho Code Section 39-8403(3)(c) of the Complementary Act.

2. Find pursuant to Idaho Code Section 39-8403(4) of the Complementary Act that the Defendant Native Wholesale's violations of Idaho Code Section 39-8403(3)(c) constitute unfair and deceptive trade practices in violation of the Idaho Consumer Protection Act, Chapter 6, Title 48, of the Idaho Code.

3. Preliminarily and permanently enjoin Defendant Native Wholesale from any future violation of Idaho Code Section 39-8403(3)(c) of the Complementary Act, pursuant to Idaho Code Sections 48-606(1)(b) of the Consumer Protection Act.



4. Find that Defendant Native Wholesale's multiple violations of the Complementary Act constitute separate violations thereof; and award judgment against Native Wholesale for civil penalties in the amount of five hundred percent (500%) of the retail value of the cigarettes unlawfully sold, or five thousand dollars (\$5,000) per violation, whichever is greater.

5. Find that Defendant Native Wholesale's multiple violations of the Complementary Act constitute separate violations of the Idaho Consumer Protection Act; and award judgment against Native Wholesale for civil penalties in the amount of five thousand dollars (\$5,000) per violation.

6. Order that any profits, gain, gross receipts or other benefit derived by Defendant Native Wholesale from its violations of the Complementary Act be disgorged and paid to the state treasurer for deposit in the general fund, as provided by Idaho Code Section 39-8407(6) of the Complementary Act.

7. Award judgment against the Defendant Native Wholesale for all of the State's reasonable costs, expenses, and attorney's fees in bringing this action, as authorized by Idaho Code Section 39-8407(5) of the Complementary Act and Idaho Code Section 48-606(1)(f) of the Consumer Protection Act.

8. Award the State such other, further, or different relief, as the Court considers appropriate.

II. The Tax Commission respectfully asks that this Court:

9. Find that Defendant Native Wholesale has violated Idaho Code Section 63-2503(1).


10. Preliminarily and permanently enjoin Defendant Native Wholesale from any future violation of Idaho Code Section 63-2503(1), pursuant to Idaho Code Section 63-2519 .

11. Award the Tax Commission such other, further, or different relief, as the Court considers appropriate.

DATED this 14<sup>th</sup> of August, 2008.

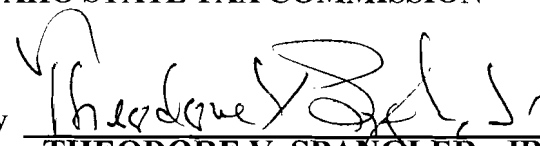
LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

By

  
BRETT T. DeLANGE  
Deputy Attorney General  
Consumer Protection Division

IDAHO STATE TAX COMMISSION


By

  
THEODORE V. SPANGLER, JR  
Deputy Attorney General  
State Tax Commission

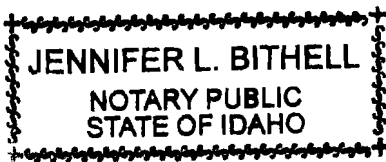
## VERIFICATION

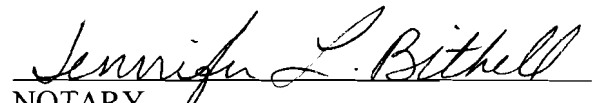
STATE OF IDAHO    )  
                              ) ss.  
County of Ada        )

Beth A. Kittelmann, being first duly sworn on oath, deposes and says that she is a Paralegal in the Consumer Protection Division of the Office of the Attorney General, that she has read the foregoing Verified Complaint, and that the facts therein are true to the best of her knowledge, information, and belief.

  
Beth A. Kittelmann  
Paralegal

SUBSCRIBED AND SWORN to before me this 14<sup>th</sup> day of August, 2008.



  
NOTARY  
Residence: Meridian, Idaho  
Commission Expires: 11-30-13



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

June 5, 2008

**VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED**

Arthur Montour, Jr.  
Native Wholesale Supply Company  
10955 Logan Road  
Perrysburg, NY 14129

P.O. Box 214  
Gowanda, NY 14070

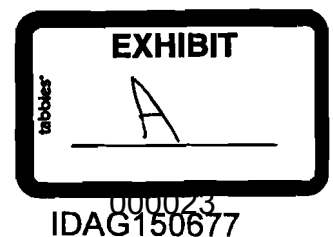
*Re: Notice of Apparent Liability Under Idaho law—Violations of Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act)*

Dear Mr. Montour:

It has come to our attention that Seneca brand cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. (Grand River Enterprises), imported by your company and held at the Nevada International Trade Corporation, Foreign Trade Zone #89, in Las Vegas, Nevada, have been sold and shipped at your company's direction from that location to at least one purchaser in the State of Idaho, namely War Path, North 165 Hwy 95, Plummer, ID 83851.

Idaho Code § 39-8403(3) of the Complementary Act makes it unlawful for any person to sell, offer for sale, possess, acquire, hold, own, import, or cause to import for sale or distribution in Idaho cigarettes of a tobacco product manufacturer or brand family not on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho's Directory). Neither Seneca brand cigarettes nor Grand River Enterprises are listed on Idaho's Directory. Additionally, sale in Idaho of cigarettes manufactured by Grand River Enterprises, including Seneca, have been enjoined by order dated September 5, 2002, of the Fourth Judicial Court, in and for the County of Ada, State of Idaho, in the case entitled State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises, Case No. CV OC 0205249M.

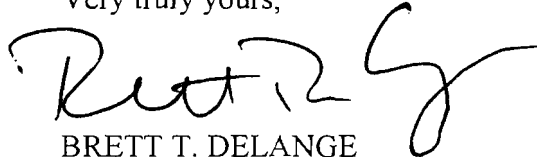
Consumer Protection Division  
Len B. Jordan Building, Lower Level, P.O. Box 83720, Boise, Idaho 83720-0010  
Telephone: (208) 334-2424, FAX: (208) 334-4151  
(800) 432-3545, Toll Free in Idaho; TDD Accessible



Arthur Montour, Jr.  
June 5, 2008  
Page 2

The purpose of this letter is to advise you of these violations and demand that all sales and shipping of Grand River Enterprise cigarettes, including Seneca brand cigarettes, into Idaho immediately cease. Please let me know by return letter, within the next two weeks, whether you will comply with this request. If we have not received a response from you by then confirming that you will comply with this request, the Office of the Idaho Attorney General reserves the right to bring an action to address these illegal sales.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brett T. DeLange", with a stylized flourish at the end.

BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
 (Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

7000 1530 0000 9416 9173

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

6/5/08  
 Postmark  
 Here

Sent To WISC  
 Street, Apt. No., or PO Box No. 10955 Logan Rd  
 City, State, ZIP+ 4 \_\_\_\_\_  
 PS Form 3800, May 2000 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 10955 Logan Road  
 Perrysburg NY 14129

**COMPLETE THIS SECTION ON DELIVERY**

A. Received by (Please Print Clearly) B. Date of Delivery

Tricia Thomas 6/11/08

C. Signature

x Tricia Thomas

☒ Agent  
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Copy from service label)

7000 1530 0000 9416 9173

**U.S. Postal Service**  
**CERTIFIED MAIL RECEIPT**  
*(Domestic Mail Only; No Insurance Coverage Provided)*

7000 1530 0000 9416 9180

**OFFICIAL USE**

Postage	\$	Postmark Here  6/5/04
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

**Sent To**

Street, Apt. No.; or P.O. Box No. NWSC

City, State, ZIP+4 POB 214

PS Form 3800, May 2000 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 P.O. Box 214  
 Gowanda NY 14070

2. Article Number

(Transfer from service label)

7000 1530 0000 9416 9180

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X

☐ Agent

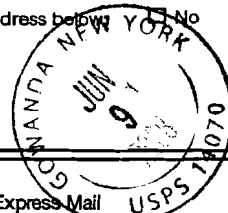
☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below ☐ No



3. Service Type

☒ Certified Mail

☐ Express Mail

☐ Registered

☐ Return Receipt for Merchandise

☐ Insured Mail

☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

IDAG1500026

[Track & Confirm](#)[FAQs](#)

## Track & Confirm

### Search Results

Label/Receipt Number: 7000 1530 0000 9416 9180

Detailed Results:

- Delivered, June 09, 2008, 1:03 pm, GOWANDA, NY 14070
- Notice Left, June 09, 2008, 8:33 am, GOWANDA, NY 14070
- Arrival at Unit, June 09, 2008, 8:33 am, GOWANDA, NY 14070

[< Back](#)[Return to USPS.com Home >](#)

### Track & Confirm

Enter Label/Receipt Number.

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No FEAR Act EEO Data

FOIA



Equal Opportunity  
Notice of Nondiscrimination



American Revolution  
1776-2026



**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED \_\_\_\_\_  
4:11

**APR 9 2009**

J. DAVID NAVARRO, Clerk  
By J. HANDALI  
DEPUTY

**Attorneys for the State of Idaho**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**PLAINTIFFS STATE OF IDAHO  
AND THE IDAHO STATE TAX  
COMMISSION'S MOTION FOR A  
PRELIMINARY INJUNCTION**

Plaintiffs the State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission (collectively "the State"), move this Court, pursuant to title 48, chapter 6, Idaho Code, and Rule 65 of the Idaho Rules of Civil Procedure, to issue a preliminary injunction enjoining and restraining Defendant Native Wholesale Supply Company ("Native Wholesale") and its employees, agents, successors, assigns, affiliates, distributors, and all other persons acting in concert with Native Wholesale and who receive actual notice of the preliminary injunction, from directly or indirectly:

1. Engaging in the conduct described in the Verified Complaint

which is alleged to be in violation of the Tobacco Master Settlement Agreement

**PLAINTIFFS STATE OF IDAHO AND THE IDAHO STATE TAX COMMISSION'S  
MOTION FOR A PRELIMINARY INJUNCTION - 1**

**ORIGINAL**

Complementary Act (“Complementary Act”), codified at Title 39, Chapter 84, Idaho Code and the Idaho Consumer Protection Act, codified at Title 48, Chapter 6, Idaho Code, including, specifically, transporting, importing, or causing to be imported cigarettes that are not included on Idaho’s Directory of Compliant Tobacco Product Manufacturers and Brand Families (“the Idaho Directory”); and

2. Engaging in the conduct described in the Verified Complaint which is alleged to be in violation of Idaho’s cigarette tax laws, codified at Title 63, Chapter 25, Idaho Code, including, specifically, the selling of cigarettes at wholesale without first applying for and possessing a cigarette permit as required by Idaho Code Section 63-2503(1).

The State’s motion for a preliminary injunction is based on the allegations contained in the State’s Verified Complaint, the April 9, 2009 Affidavit of Beth Kittelmann (“Kittelmann Affidavit”), the April 8, 2009 Affidavit of Don Anderson (“Anderson Affidavit”), and all pleadings previously filed in this matter. The Verified Complaint and Kittelmann and Anderson Affidavits reveal that Native Wholesale has engaged in acts and practices in violation of the Complementary and Consumer Protection Acts and Idaho’s cigarette tax laws and continues to do so today.

DATED this 9<sup>th</sup> day of April, 2009.


**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By



**BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division**

IDAHO STATE TAX COMMISSION

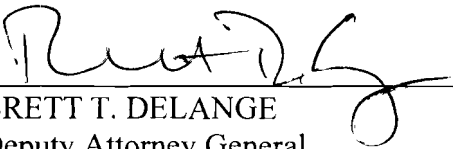
By   
THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of April, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile

  
\_\_\_\_\_  
BRETT T. DELANGE  
Deputy Attorney General

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:11

**APR 09 2009**

**J. DAVID NAVARRO, Clerk  
By J. HALLDALL  
DEPUTY**

**Attorneys for the State of Idaho**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**PLAINTIFFS STATE OF IDAHO  
AND THE IDAHO STATE TAX  
COMMISSION'S MEMORANDUM  
IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**INTRODUCTION**

For more than four years, Defendant Native Wholesale Supply Company ("Native Wholesale"), a foreign corporation, has systematically violated Idaho's tobacco sales and cigarette tax laws. It continues to do so today. Plaintiffs the State of Idaho ("the State"), and the Idaho State Tax Commission ("Tax Commission") have moved this Court to issue a preliminary injunction enjoining Native Wholesale and its employees, agents, successors, assigns, affiliates, distributors, and all other persons acting in concert with Native Wholesale and who receive actual notice of the preliminary injunction, from directly or indirectly:

**PLAINTIFFS STATE OF IDAHO AND THE IDAHO STATE TAX COMMISSION'S  
MEMORANDUM IN SUPPORT OF' MOTION FOR PRELIMINARY INJUNCTION - 1**

000032  
**ORIGINAL**

1. Engaging in the conduct described in the Verified Complaint in violation of the Tobacco Master Settlement Agreement Complementary Act (“Complementary Act”), codified at Title 39, Chapter 84, Idaho Code, and the Idaho Consumer Protection Act, codified at Title 48, Chapter 6, Idaho Code, including, specifically, transporting, importing, or causing to be imported cigarettes that are not included on Idaho’s Directory of Compliant Tobacco Product Manufacturers and Brand Families (“the Idaho Directory”); and

2. Engaging in the conduct described in the Verified Complaint in violation of Idaho’s cigarette tax laws, codified at Title 63, Chapter 25, Idaho Code, including, specifically, the selling of cigarettes at wholesale without first applying for and possessing a cigarette permit as required by Idaho Code Section 63-2503(1).

The State’s and the Tax Commission’s motion for a preliminary injunction is based on the State’s and the Tax Commission’s Verified Complaint, the April 9, 2009 Affidavit of Beth Kittelmann (“Kittelmann Affidavit”), the April 8, 2009 Affidavit of Don Anderson (“Anderson Affidavit”), and all pleadings previously filed in this matter. The Verified Complaint and Kittelmann and Anderson Affidavits reveal that Native Wholesale has engaged in acts and practices in violation of the Complementary and Consumer Protection Acts and Idaho’s cigarette tax laws and continues to do so today.

Native Wholesale’s Idaho law violations are straightforward.<sup>1</sup> Since January 2004, Native Wholesale has sold at wholesale over 100 million cigarettes to Idaho retailers, in violation of section 39-8403(3) of the Complementary Act. None of the cigarettes that Native Wholesale

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<sup>1</sup> Indeed, there is no genuine issue of material fact regarding Native Wholesale’s violations, and upon completion of relevant discovery into the scope and size of Native Wholesale’s violations, the State and the Tax Commission anticipate bringing a motion for summary judgment.

has sold and continues to sell are of cigarette brand families that are listed on the Idaho Directory. Pursuant to Idaho Code Section 39-8406(5) of the Complementary Act, a violation of that Act also constitutes a violation of the Idaho Consumer Protection Act. In addition, Native Wholesale has failed to obtain the required tax permit to sell cigarettes at wholesale in Idaho, pursuant to Idaho Code Section 63-2503(1) of Idaho's cigarette tax laws.

The State's and the Tax Commission's Verified Complaint and the Kittelmann and Anderson Affidavits demonstrate that the State and the Tax Commission will prevail on the merits of their Verified Complaint. Additionally, the Verified Complaint and the Kittelmann and Anderson Affidavits indicate Native Wholesale's systemic, repeated, and continuing violations of Idaho law and the need to preliminarily enjoin such violations from continuing. Accordingly, the State and the Tax Commission respectfully request that this Court grant their motion and enter a preliminary injunction against Native Wholesale.

### **STATEMENT OF FACTS**

Since at least January 1, 2004, Native Wholesale, a corporation located in New York, has acquired, held, owned, possessed, transported, imported, and/or caused to be imported for sale and distribution in Idaho two cigarette brands -- Seneca and Opal -- that are manufactured by Canadian-based tobacco manufacturer Grand River Enterprises Six Nations, Ltd. ("Grand River").<sup>2</sup> Native Wholesale's sales and shipments into Idaho have totaled over 100 million cigarettes. None of the Seneca and Opal brand cigarettes Native Wholesale has sold has ever been listed on the Idaho Directory and approved for sale.<sup>3</sup>

On or about September 5, 2002, an Idaho district court issued an injunction ("2002 injunction") against Grand River, prohibiting it from selling any cigarettes in Idaho "whether

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<sup>2</sup> Kittelmann Affidavit at p. 2, ¶ 3.

<sup>3</sup> Kittelmann Affidavit at p. 2, ¶ 4.

directly or through a distributor, retailer or similar intermediary or intermediaries.”<sup>4</sup> The 2002 injunction was based on Grand River’s refusal to comply with the Idaho Tobacco Master Settlement Agreement Act (discussed in detail below). Because Grand River has yet to establish a qualified escrow fund, failed to certify its cigarettes to the Attorney General in compliance with Idaho’s tobacco sales laws, and has not obeyed the district court’s injunction, Grand River remains enjoined from selling cigarettes in Idaho.<sup>5</sup>

In February of 2008, the Attorney General obtained information indicating that, despite the district court’s 2002 injunction, Grand River cigarettes were continuing to be sold into Idaho by Native Wholesale. Accordingly, on June 5, 2008, the Attorney General notified Native Wholesale of the 2002 injunction, and informed Native Wholesale that its cigarette sales violated the Complementary Act.<sup>6</sup> In his letter, the Attorney General instructed Native Wholesale to cease its unlawful selling and shipping of Grand River cigarettes to Idaho retailers.<sup>7</sup>

Ignoring the Attorney General’s June 5, 2008, letter, Native Wholesale continued to ship Seneca and Opal cigarette brands into Idaho. On June 13, 2008, Native Wholesale imported and/or caused to be imported into Idaho 1,460,000 Seneca and Opal brand cigarettes.<sup>8</sup> On July 21, 2008, Native Wholesale imported and/or caused to be imported into Idaho 1,634,000 Seneca and Opal brand cigarettes.<sup>9</sup> On August 21, 2008, two days after Native Wholesale was served with the summons and complaint in this case, Native Wholesale sold over 600,000 more

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<sup>4</sup> Kittelmann Affidavit at p. 3 ¶ 6.

<sup>5</sup> Kittelmann Affidavit at p. 3, ¶ 7.

<sup>6</sup> Kittelmann Affidavit at p. 3, ¶ 8.

<sup>7</sup> Kittelmann Affidavit at p. 3, ¶ 8.

<sup>8</sup> Kittelmann Affidavit at p. 3, ¶ 9.

<sup>9</sup> Kittelmann Affidavit at p. 3, ¶ 9.



cigarettes, at wholesale, to an Idaho retailer.<sup>10</sup> In 2009, Native Wholesale has sold and shipped 2,508,000 more cigarettes, at wholesale, to an Idaho retailer.<sup>11</sup>

In total, since January 2004, Native Wholesale has imported and sold into Idaho over 100 million Seneca and Opal brand cigarettes.<sup>12</sup> Because these cigarettes have never been listed on the Idaho Directory, Native Wholesale has violated and is violating the Complementary Act. Additionally, Native Wholesale has never applied for nor possessed a cigarette permit required by Idaho Code Section 63-2503.<sup>13</sup> Yet all of its 100 million plus cigarettes sales have been at wholesale.<sup>14</sup> Native Wholesale continues to violate Idaho's cigarette tax laws by importing cigarettes into Idaho and selling them at wholesale without the required cigarette permit required by Idaho's cigarette tax laws.<sup>15</sup>

After being served with the summons and complaint in this case, Native Wholesale removed this case to federal court. The removal was improper and the federal court granted the State's motion to remand. The removal did accomplish one thing, however. It allowed Native Wholesale to further delay the State and the Tax Commission from seeking the present injunctive relief and bringing Native Wholesale into compliance with Idaho law.

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<sup>10</sup> Kittelmann Affidavit at p. 3, ¶ 10.

<sup>11</sup> Kittelmann Affidavit at p. 3, ¶ 11.

<sup>12</sup> Kittelmann Affidavit at p. 4, ¶ 12.

<sup>13</sup> Anderson Affidavit at p. 2, ¶ 4.

<sup>14</sup> Anderson Affidavit at p. 2, ¶¶ 5-6.

<sup>15</sup> Anderson Affidavit at p. 2, ¶¶ 5-6.

## **ARGUMENT**

### **I.**

#### **THE CONSUMER PROTECTION ACT AND RULE 65 OF THE IDAHO RULES OF CIVIL PROCEDURE AUTHORIZE THIS COURT TO ISSUE A PRELIMINARY INJUNCTION BASED ON NATIVE WHOLESALE'S CONTINUED VIOLATION OF THE COMPLEMENTARY ACT**

Idaho Code Section 38-8406(5) of the Complementary Act states that a person who violates Section 38-8403(3) of the Complementary Act “engages in an unfair and deceptive trade practice in violation of the Idaho consumer protection act.” This has particular significance because, as spelled out below, the Attorney General is authorized under the Consumer Protection Act to seek a variety of equitable remedies, including obtaining preliminary injunctive relief.

##### **A. The Consumer Protection Act and Rule 65(e), I.R.C.P. Provide for the Issuance of Preliminary Injunctions When the Act Is Being Violated**

Section 48-606(1)(b) of the Consumer Protection Act authorizes the Attorney General to bring an action, in part, to enjoin any method, act, or practice that violates any provision of the Act. Preliminary and permanent injunctions are expressly authorized by Section 48-606. Idaho Code Section 48-607(1) of the Consumer Protection Act further expressly authorizes the Court to “[m]ake such orders or judgments as may be necessary to prevent the use or employment by a person of any method, act or practice declared to be a violation of the provisions of this chapter.” Thus, pursuant to the Consumer Protection Act, the Attorney General is statutorily authorized to seek, and this Court to issue, an injunction in this case, enjoining Native Wholesale from future, continued violations of the Complementary Act.<sup>16</sup>

Rule 65(e) of the Idaho Rules of Civil Procedure identifies several situations in which a court may issue an injunction. Rule 65(e)(1) governs in the present case and provides:

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<sup>16</sup> The Consumer Protection Act defines “person” to include corporations like Native Wholesale. *See* Idaho Code § 48-602(1).

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

Rule 65(e)(1), I.R.C.P. The Idaho Supreme Court affirmed the standards of Rule 65(e)(1) in Brady v. City of Homedale, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (stating that it is proper to issue an injunction when the requesting party meets the standards outlined Rule 65(e)(1)).

Granting an injunction is within the sound discretion of the district court. See Miller v. Ririe Joint Sch. Dist. No. 252, 132 Idaho 385, 973 P.2d 156 (1999). The burden of proving the right to an injunction is on the party seeking it. Harris v. Cassia County, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984). However, the party requesting the injunction is not required to make the same showing that he or she would be required to make to obtain the relief sought at trial. See White v. Coeur d'Alene Big Creek Mining Co., 56 Idaho 282, 288, 55 P.2d 720, 722 (1936). In fact, Idaho courts have held that it is proper to grant a preliminary injunction based on a party's complaint and affidavit. See Pfirman v. Success Mining Co., 32 Idaho 125, 126-27, 179 P. 50 (1919); Weber v. Della Mountain Mining Co., 11 Idaho 264, 277, 81 P. 931, 934-35 (1905).

When it is the government that seeks preliminary injunctive relief in the nature of an order prohibiting actions in violation of a statute, there are special rules that apply. In particular, both state and federal courts hold that "when a statute grants a specific injunctive remedy . . . the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law . . .'" Ackerman v. Tri-City Geriatric & Health Care, Inc., 378 N.E.2d 145, 148 (Ohio 1978) *quoting*

Stephen v. Daniels, 27 Ohio St. 527, 536 (Ohio 1875); *see also e.g. United States v. Estate Preservation Services*, 202 F.3d 1093, 1098 (9<sup>th</sup> Cir. 2000). Indeed, “[w]hen it is determined that the statute is being violated, it is within the province of the district court to restrain it. The doctrine of balancing of equities has no application to this statutorily authorized injunctive relief.” State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 805 (Tx. 1979). Moreover, “when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor.” L.E. Services, Inc. v. State Lottery Commission of Indiana, 646 N.E.2d 334, 349 (Ind.App. 1995); Arizona State Board of Dental Examiners v. Hyder, 562 P.2d 717, 719 (Az. 1977).

One final point: When preliminary injunctive relief is authorized and the public interest is involved, “courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest that they are accustomed to go when only private interests are involved.” United States v. First Nat’l City Bank, 379 U.S. 378, 383 (1965). When the State sues in its capacity as protector of the public interest, an injunction may be based upon the conclusion that the activity is a danger to that interest. United States v. Marin Shale Processors, 81 F.3d 1329, 1359 (5<sup>th</sup> Cir 1996). This principle draws support from the deference courts grant the political branches in identifying and protecting the public interest. *Id.* There cannot be any doubt as to the import the State of Idaho puts in regulating and controlling tobacco sales and its cigarette tax laws, as spelled out below.

**B. The Legislature, In Protecting The State’s Public Health And Fiscal Soundness, Has Enacted Significant Legislation Regulating Tobacco Sales and Deterring Violations of These Laws**

In 1999, the Legislature found that smoking presents serious public health concerns to Idaho and its citizens. *See* Idaho Code § 39-7801(a). Noting that the Surgeon General also

determined that smoking causes lung cancer, heart disease, and other serious diseases, the Legislature found that smoking poses serious financial concerns for Idaho. Under certain health-care programs like Medicaid, Idaho may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with smoking, and those persons may have a legal entitlement to receive such assistance. *See* Idaho Code § 39-7801(a) - (b). While providing the programs' services, the Legislature found that the State pays millions of dollars each year to provide medical assistance to persons for health conditions associated with smoking. *See* Idaho Code § 39-7801(c). The Legislature further determined that the financial burdens imposed on the State by smoking should be borne by tobacco companies, rather than by the State, to the extent that such companies either determine to enter into settlement agreements with the State or are found culpable by the courts. *See* Idaho Code § 39-7801(d).

In November 1998, leading United States tobacco companies entered into a settlement agreement, entitled the "Master Settlement Agreement," (MSA) with Idaho.<sup>17</sup> The MSA has been described by the United States Supreme Court as a "landmark" public health agreement, Lorillard Tobacco Corp. v. Reilly, 533 U.S. 525, 533 (2001), that addresses "one of the most troubling public health problems facing the Nation today." Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

The MSA is fundamentally a public health agreement. Section III of the MSA addresses the public health by placing significant restrictions on the advertising and marketing of tobacco products by those companies signing the MSA (participating manufacturers). The restrictions

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<sup>17</sup> The MSA is a lengthy public document. It was reviewed and approved by the district court in State v. Philip Morris et al., Case No. CV OC 9703239D, Fourth Judicial District, Ada County (December 3, 1998) (Eismann, D.J.) *See* Consent Decree and Final Judgment, Sec. VII.A. The Office of the Attorney General has made the MSA electronically available at: <http://www2.state.id.us/ag/consumer/tobacco/MSA.pdf>. The Court may take judicial notice of the MSA. I.R.E. 201.

include:

- prohibiting the targeting of tobacco product advertising or marketing to children;
- banning the use of cartoons to advertise tobacco products;
- limiting tobacco brand name sponsorships;
- prohibiting payments for the use of tobacco products in the media;
- prohibiting tobacco brand name merchandise;
- prohibiting the distribution of free tobacco products to children;
- prohibiting the distribution of tobacco coupons or other credits to children;
- restricting the licensing of tobacco brand names to third parties; and
- prohibiting material misrepresentations regarding the health consequences of smoking.

The MSA has had a substantial impact on cigarette consumption in the United States, which, according to the Centers for Disease Control and Prevention (CDC), has declined by 25 percent since the MSA was executed.<sup>18</sup> According to the CDC, youth smoking rates have also dramatically declined.<sup>19</sup> In addition to its public health provisions, the MSA requires participating manufacturers (which now number 55) to make payments to Idaho every year to offset a portion of the costs imposed on Idaho's taxpayers by smoking-related diseases. *See* MSA, Section IX.

Promptly after the MSA was executed, the Legislature declared that it would be contrary to the policy of the State if a tobacco manufacturer could decide not to enter into such a settlement agreement (nonparticipating manufacturers) and thereby use the resulting cost advantage to derive large profits in the years before liability may arise, without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. This legislative determination was driven, in part, by the fact that many diseases

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<sup>18</sup> See CDC - Smoking and Tobacco Use, Cigarette Production, Exports, and Domestic Consumption – United States, 1990-2007, *available at* [http://www.cdc.gov/tobacco/data\\_statistics/tables/economics/expdcom.htm](http://www.cdc.gov/tobacco/data_statistics/tables/economics/expdcom.htm) (last visited December 11, 2008) (demonstrating that total domestic consumption of cigarettes in the United States has decreased from a level of 480 billion cigarettes in 1998 to 360 billion in 2007, a decline of 120 billion or 25%).

<sup>19</sup> See "Cigarette Smoking Among High School Students -- United States, 1991-2007, MMWR, June 27, 2008, Vol. 57, No. 25, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5725a3.htm>.

caused by tobacco use often do not appear until many years after the affected individual begins smoking. *See* Idaho Code § 39-7801(a) & (f).

The Legislature thus determined that it is in the interest of the State to require that nonparticipating manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. *See* Idaho Code § 39-7801(f). Accordingly, shortly after the MSA was signed, the Legislature passed the Idaho Tobacco Master Settlement Agreement Act (Idaho MSA Act). The Idaho MSA Act requires tobacco companies to either (1) join the Master Settlement Agreement or (2) place into a qualified escrow fund the amounts required by Idaho Code Section 39-7803(b)(1) of the Act.

In 2003, the Legislature determined that violations of the Idaho MSA Act by various non-participating manufacturers threatened not only the integrity of the MSA, but also the fiscal soundness of the State and public health and responded with provisions to help prevent such violations through adoption of the Complementary Act. *See* Idaho Code § 39-8401. Relevant to this case, Section 39-8403 of the Complementary Act establishes the Idaho Directory and makes it unlawful, in part, for any person to “transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in violation of the provisions of the Complementary Act. Idaho Code § 39-8403(3)(c).

As noted above, Section 39-8406(5) of the Complementary Act provides that a violation of that Act also constitutes an unfair or deceptive act or practice under the Consumer Protection Act. Codified at Title 48, Chapter 6, Idaho Code, the Consumer Protection Act is remedial legislation intended to deter deceptive or unfair trade practices. *See* Idaho Code § 48-601. Therefore, it is accorded a liberal construction. *See* Western Acceptance Corporation, Inc. and

Donald Christensen v. Jones, 117 Idaho 399, 401, 788 P.2d 214, 216 (1990). And, as also previously noted, Section 48-606(1)(b) of the Consumer Protection Act authorizes the Attorney General to bring an action, in part, to enjoin any method, act, or practice that violates any provision of the Act. Preliminary and permanent injunctions are expressly authorized by Section 48-606.

**C. Native Wholesale's Continued Violation of the Complementary Act Warrants Entry of a Preliminary Injunction Pursuant to the Consumer Protection Act and Rule 65(e) of the Idaho Rules of Civil Procedure**

Since January 1, 2004, Native Wholesale has been operating in violation of the Complementary Act. The company has acquired, held, owned, possessed, transported, imported and/or caused to be imported non-compliant cigarettes in Idaho. Seneca and Opal, the two brands that Native Wholesale imports into Idaho, are manufactured by Grand River and are not listed on the Idaho Directory. To date, Native Wholesale has imported and sold to Idaho retailers the following amounts of cigarettes:

2004:	24,650,000
2005:	21,406,000
2006:	22,830,000
2007:	24,442,000
2008:	14,152,000
2009:	2,508,000 <sup>20</sup>

Under Idaho Code Section 39-8406(5) of the Complementary Act, Native Wholesale's ongoing violation of the Act also constitutes violations of the Consumer Protection Act. Despite the Attorney General's written warning in June 2008 to cease its unlawful activities, Native Wholesale continues its blatant disregard for Idaho law. It is evident that until this Court enjoins Native Wholesale from selling cigarettes that are not listed on the Idaho Directory, Native Wholesale will continue to violate the Complementary Act by selling illegal cigarettes.

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<sup>20</sup> Kittelmann Affidavit at p. 3, ¶ 12.



Therefore, the State asks this Court to grant the State's Motion and enter a preliminary injunction to stop Native Wholesale's persistent violation of Idaho's tobacco sales laws.

## **II.**

### **THE TAX COMMISSION IS ENTITLED TO A PRELIMINARY INJUNCTION UNDER THE IDAHO CIGARETTE TAX LAWS OF IDAHO CODE SECTIONS 63-2503(1) AND 63-2519**

Idaho's cigarette tax laws require wholesalers who sell cigarettes to Idaho retailers to obtain a cigarette permit. Specifically, Idaho Code Section 63-2503(1) provides:

It shall be unlawful for a person to act as a wholesaler of cigarettes without a permit. The permit shall be obtained by application to the tax commission upon a form furnished by it, accompanied by a fee of fifty dollars (\$50.00). The wholesaler permit shall be nonassignable and shall continue in force until surrendered or canceled.

A "wholesaler" is defined in Idaho Code Section 63-2502(a) as "every person who purchases, sells or distributes cigarettes to other wholesalers or to retailers for the purpose of resale."

Idaho Code Section 63-2519 of the cigarette tax laws expressly authorizes the Tax Commission to seek injunctive relief against any person engaged in the cigarettes business as a wholesaler without holding a valid permit.

Native Wholesale has sold over 100 million cigarettes to Idaho retailers for the purpose of resale since January 1, 2004. At no time has Native Wholesale, acting as a wholesaler, applied for or possessed a cigarette permit as required by Idaho Code Section 63-2503(1).<sup>21</sup> Native Wholesale's continued selling of cigarettes in Idaho without first obtaining a permit constitutes a violation of Idaho's cigarette tax laws and establishes an additional basis for entering a preliminary injunction against Native Wholesale.

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<sup>21</sup> Anderson Affidavit at p. 2, ¶ 4


**CONCLUSION**

Based on the foregoing argument, the State and the Tax Commission respectfully request that this Court issue a preliminary injunction against Native Wholesale, enjoining it from further violating the Complementary Act, the Consumer Protection Act, and Idaho's cigarette tax laws.

DATED this 9<sup>th</sup> day of April, 2009.

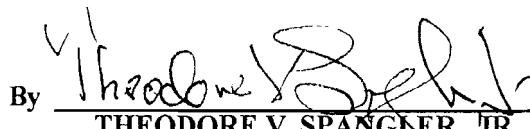
**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By

  
**BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division**

**IDAHO STATE TAX COMMISSION**

By

  
**THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission**

## CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of April, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile

  
BRETT T. DELANGE  
Deputy Attorney General

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

NO. \_\_\_\_\_  
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**APR 09 2009**

**J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY**

**Attorneys for the State of Idaho**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**AFFIDAVIT OF DON ANDERSON**

STATE OF IDAHO )  
 ) ss.  
COUNTY OF ADA )

Don Anderson, being first duly sworn, deposes and says:

1. My name is Don Anderson. I am a Principal Financial Specialist in the Tax Discovery Bureau and Audit and Collections Division of the Idaho State Tax Commission (ISTC). I have held my current position since September 2004 and have been employed by the ISTC since July 1990. I hold an Associates of Science degree in business and a Bachelor of Arts in music business, and I have 32 hours of supplemental accounting credits. I am a Certified

Private Investigator and a Certified Public Manager. I make this Affidavit from personal knowledge and/or from review of Idaho State Tax Commission records.

2. My duties include enforcement and administration of Idaho's Master Settlement Agreement (MSA), cigarette and tobacco laws, including identifying issues of non-compliance with MSA, cigarette, and tobacco tax permitting and reporting requirements, determining potential audit candidates, conducting audits, and resolving reporting or audit discrepancies.

3. In order to keep Idaho's enforcement of its MSA, cigarette, and tobacco tax laws abreast of current industry developments, my predecessors kept, and I continue to keep, in regular contact with the Office of the Attorney General regarding all MSA related issues. My predecessors participated, and I continue to participate, in regularly scheduled telephone conference calls facilitated by the Federation of Tax Administrators (FTA) for the purpose of discussing MSA, cigarette, and tobacco tax administration and enforcement related issues. I have formed and facilitate quarterly meetings with the members of what has been termed ITEC, the Idaho Tobacco Enforcement Committee. ITEC is comprised of representatives of Idaho's Department of Health and Welfare, Office of the Attorney General, State Tax Commission, and the State Fire Marshal.

4. Native Wholesale Supply Company (NWS) has never applied for, nor has it ever possessed, an Idaho cigarette tax permit.

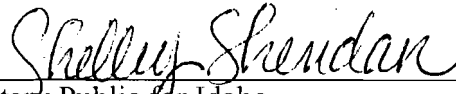
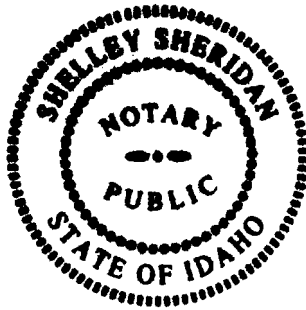
5. The shipping and distribution activities that NWS engages in when it ships or causes to be shipped Seneca and Opal brand cigarettes into Idaho are considered wholesale sales under Idaho's cigarette tax laws.

6. Pursuant to Idaho Code Section 63-2503(1), companies engaging in wholesale sales are required to obtain a cigarette tax permit. To date, NWS has never attempted to obtain a cigarette tax permit, nor has it ever filed any tax returns with the Idaho State Tax Commission.



DON ANDERSON

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of April, 2009.



Notary Public for Idaho

Residing at: Mendocino, Idaho

My Commission Expires: 11/8/2012

### CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of April, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



BRETT T. DELANGE  
Deputy Attorney General

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 West Jefferson, 2<sup>nd</sup> Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_ 4/11

APR 6 9 2009

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,

Defendant.

Case No. CV OC 0815228

AFFIDAVIT OF BETH A.  
KITTELMANN

STATE OF IDAHO )  
County of Ada ) ss.

Beth A. Kittelmann, being first duly sworn, deposes and says:

1. I am a Paralegal for the Consumer Protection Division of the Office of the Idaho Attorney General. One of my duties is to oversee and maintain records received and compiled by the Office of the Attorney General that relate to the matters set forth in this Affidavit. Relevant to this case, I maintain the Idaho Directory of Compliant Tobacco Product



Manufacturers and Brand Families (Directory) and ensure that all cigarettes and roll-your-own (RYO) tobacco sold to Idaho consumers and retailers are of compliant brands and manufacturers certified for sale in Idaho and listed on the Directory. In addition, when information is received regarding tobacco sales made to Idaho consumers, I verify whether the tobacco manufacturer and/or distributor is in compliance with applicable Idaho laws and regulations regarding sales into Idaho.

2. The duties I have outlined above are done in the regular course of the Office's duties under the Idaho Tobacco Master Settlement Agreement Complementary Act (Complementary Act), codified at Title 39, Chapter 84, Idaho Code. Within this capacity and as a result of my duties, I have personal knowledge and information of the facts set forth herein, as well as their accuracy. I also have personal knowledge of the records referred to in this Affidavit.

3. The Seneca and Opal brand cigarettes are manufactured by Grand River Enterprises Six Nations, Ltd. (GRE), a foreign cigarette manufacturer located in Ohseweken, Ontario, Canada.

4. The Seneca and Opal brand cigarettes and their manufacturer, GRE, have never been listed on Idaho's Directory of Compliant Tobacco Product Manufacturers and Brands (Directory) and thus have never been approved for sale in Idaho.

5. In 2002, the Idaho Attorney General received information that at least 3,244,000 non-compliant cigarettes manufactured by GRE were sold into Idaho and subsequently, on July 9, 2002, filed suit against GRE for numerous violations of Idaho's Tobacco Master Settlement Agreement Act (MSA Act). (See Exhibit A attached hereto.)

6. On September 5, 2002, the Ada County District Court entered a Default Judgment against GRE. Among the relief awarded the State of Idaho was a permanent injunction against GRE selling its cigarettes in Idaho “whether directly or through a distributor, retailer or similar intermediary or intermediaries.” (See Exhibit B attached hereto.)

7. To date, GRE has not satisfied the judgment entered on September 5, 2002, nor has it sought to have its cigarettes certified for sale in Idaho in compliance with the Complementary Act. As of today, cigarettes manufactured by GRE remain illegal for sale in Idaho.

8. In February 2008, the Idaho Attorney General’s Office received information that Seneca and Opal brand cigarettes manufactured by GRE were being sold and imported into Idaho by Native Wholesale Supply Company (NWS) and began its investigation. On June 5, 2008, the Idaho Attorney General notified NWS that sales of Seneca and Opal brand cigarettes into Idaho were enjoined and requested that NWS cease the unlawful shipments and sales of GRE cigarettes to Idaho retailers. (See Exhibit C attached hereto.)

9. Despite its receipt of the June 5, 2008 letter on June 12, 2008, NWS continued to ship Seneca and Opal brand cigarettes into Idaho. On June 13, 2008, NWS caused to be shipped 1,460,000 Seneca and Opal cigarettes into Idaho. On July 21, 2008, NWS caused to be shipped 1,634,000 Seneca and Opal brand cigarettes into Idaho. (See Exhibits D and E attached hereto.)

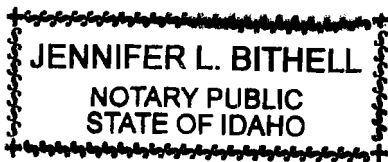
10. On August 21, 2008, two days after NWS was served with the Summons and Complaint in this action, NWS caused to be shipped over 600,000 more cigarettes into Idaho. (See Exhibit F attached hereto.)

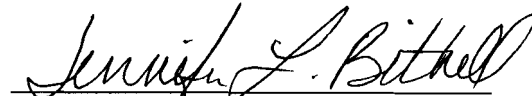
11. In January 2009, NWS caused to be shipped 2,508,000 more cigarettes into Idaho. (See Exhibits G and H attached hereto.)

12. Attached as Exhibit I is an Excel spreadsheet I prepared based upon invoice and shipping documents obtained for shipments of Seneca and Opal brand cigarettes into Idaho. This spreadsheet shows that to date, NWS has sold into Idaho over 100 million illegal cigarettes. In fact, just in the eight months this lawsuit has been pending in the state and federal district courts, NWS has caused to be shipped over 8.5 million cigarettes into Idaho.

  
BETH A. KITTELMANN

SUBSCRIBED AND SWORN to before me this 9<sup>th</sup> day of April, 2009.




  
Notary Public for Idaho  
Residing at Meridian, ID  
My Commission Expires: 11-30-13

### CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of April, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
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\_\_\_\_\_  
BRETT T. DELANGE  
Deputy Attorney General

ALAN G. LANCE  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Unit  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State St., Lower Level  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
ALAN G. LANCE, Attorney General

Plaintiff,

vs.

GRAND RIVER ENTERPRISES, a  
foreign corporation,

Defendant.

Case No.

CV 00 0205249M

VERIFIED  
COMPLAINT

BACKGROUND

1. The Idaho Legislature, in enacting the Idaho Tobacco Master Settlement Agreement Act, Idaho Code § 39-7801, et seq., found that cigarette smoking presents serious public health concerns to the state of Idaho and to Idaho citizens. Indeed, the Surgeon General has determined that smoking causes lung cancer, heart disease, and other serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.

2. The Idaho Legislature further found that cigarette smoking also presents serious financial concerns for the State of Idaho. Under certain health-care programs, the State may have a legal obligation to provide medical assistance to eligible persons for health conditions

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. \_\_\_\_\_

JUL 09 2002

By J. DAVID NAVARRO, Clerk  
DEPUTY

EXHIBIT

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associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance.

3. Under these programs, the Legislature found, the State of Idaho pays millions of dollars each year to provide medical assistance to persons for health conditions associated with cigarette smoking.

4. The Idaho Legislature thus concluded that it would be the policy of the State of Idaho that financial burdens imposed on the State by cigarette smoking be borne by tobacco product manufacturers, rather than by the State, to the extent that such manufacturers either determine to enter into settlement agreements with the State or are found culpable by the courts.

5. On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the State of Idaho. The Master Settlement Agreement obligates these manufacturers to pay substantial sums to the State (tied in part to their volume of sales); to fund a national foundation devoted to the pursuit of public health interests; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

6. The Idaho Legislature decreed that it would be contrary to the policy of the State of Idaho if tobacco product manufacturers who determine not to enter into such a settlement agreement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. The Legislature thus determined that it is in the interest of the State to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

7. Accordingly, shortly after the Master Settlement Agreement was signed, the Idaho legislature passed the Idaho Tobacco Master Settlement Agreement Act, (the "Act"), effective July 1, 1999. In essence, the Act requires "tobacco product manufacturers" to either: (1) "[b]ecome a participating manufacturer (as that term is defined in Section II(jj) of the Master

Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement,” or (2) place into a qualified escrow fund by April 15 of the year following the year in question, the amounts required by Idaho Code § 39-7803(b)(1) of the Act.

### **PARTIES, JURISDICTION, AND VENUE**

8. Pursuant to Idaho Code § 39-7803(3) of the Act, the Attorney General is authorized to bring this civil action to enforce the tobacco manufacturer escrow requirements of the Act.

9. Based upon information and belief, Defendant Grand River Enterprises (“Grand River”) is a Canadian corporation and has its principal place of business at 6 Nations Ltd., Box 750, Ohseweken, Ontario N0A 1M0, Canada.

10. Pursuant to Idaho Code § 5-514 and Idaho Code § 39-7803(3) of the Act, this Court has personal jurisdiction over the Defendant because it contracted to sell, sold, and profited from the sale of cigarettes through intermediaries to consumers in Idaho, thereby transacting business within this State and availing itself of the privilege of conducting activities within the State. Upon information and belief, these sales continue to occur in the State of Idaho.

11. Because the Defendant is a non-resident of the State of Idaho, venue is proper in this Court pursuant to Idaho Code § 5-404.

### **FACTUAL BACKGROUND**

12. The Defendant is a “tobacco product manufacturer” as defined by Idaho Code § 39-7802(i) of the Act because it manufactures cigarettes that it intends to be sold in the United States and/or because it is a first purchaser anywhere for resale in the United States of cigarettes that it intends to be sold in the United States.

13. During the period January 1, 2001 to December 31, 2001, the Defendant contracted to sell, sold, or profited from the sale of cigarettes to consumers in the State of Idaho through intermediaries. Specifically for the time period January 1, 2001 to December 31, 2001, the Defendant contracted to sell, sold, or profited from the sale of at least 3,244,000 cigarettes into Idaho, as measured by excise taxes collected by the Idaho State Tax Commission on cigarette packages bearing the excise tax stamp of the State of Idaho.

14. The Defendant has not fulfilled its obligations under the Act because it has neither become a participating manufacturer by signing the Master Settlement Agreement and generally performing its financial obligations under the Agreement, nor has it placed into a qualified escrow fund by April 15 of the year following the year in question, the amounts required by Idaho Code § 39-7803(b)(1) of the Act.

15. Because the Defendant has not signed the Master Settlement Agreement, Idaho Code § 39-7803(b)(1) of the Act requires the Defendant to place in escrow \$.0136125 per cigarette sold in Idaho, as adjusted for inflation. For the year 2001, this amount totals \$48,434.87.

16. The Defendant was notified in writing of the obligations to place money on behalf of the State of Idaho into a qualified escrow account pursuant to the Act by notice and letters dated February 20, 2002, March 20, 2002 and May 23, 2002.

17. By information and belief, the Defendant has been informed of its escrow obligations by one or more of its agents (cigarette importers and distributors), and has been informed of similar escrow obligations by other states that have adopted virtually identical statutes to the Act.

### **FIRST CAUSE OF ACTION**

18. The Attorney General incorporates by reference the allegations contained in paragraphs 1 through 17 herein.

19. The Defendant knew of the law requiring it to place money into a qualified escrow account as alleged herein.

20. The Defendant's failure to join the Master Settlement Agreement or deposit the required funds in a qualified escrow account as required by Idaho Code § 39-7803 of the Act is a knowing violation of the Act.

21. For a knowing violation of the Act, the civil penalty to be assessed against the Defendant, pursuant to Idaho Code § 39-7803(b)(3)(B), should be an amount not to exceed 15% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300% of the original amount improperly withheld from escrow. At the rate of 15% per day the civil penalty for the total amount Grand River improperly withheld each day from



April 15, 2002 exceeds 300%. Therefore, this Court should impose a civil penalty in the amount of 300%, or \$145,304.61 for the Defendant's knowing violation of the statute.

## **SECOND CAUSE OF ACTION**

22. The Attorney General incorporates the allegations set forth in paragraphs 1 through 21 herein.

23. Alternatively, the Defendant's failure to join the Master Settlement Agreement or deposit the required funds in a qualified escrow account as required by Idaho Code § 39-7803 of the Act is a non-knowing violation of the Act.

24. For a non-knowing violation of the Act, the civil penalty assessed against the Defendant should be an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100% of the original amount improperly withheld from escrow for the Defendant's violation of the Act. At the rate of 5% per day the civil penalty for the total amount Grand River improperly withheld each day from April 15, 2002 exceeds 100%. Therefore, this Court should impose a civil penalty in the amount of 100%, or \$48,434.87 for the Defendant's non-knowing violation of the statute.

## **REQUEST FOR RELIEF**

The Attorney General respectfully asks that this Court:

1. Find that the Defendant has violated Idaho Code § 39-7803(b)(1) of the Act by failing to establish a qualified escrow fund on behalf of the State of Idaho for cigarettes sold within the State of Idaho for the time period of January 1, 2001 through December 31, 2001.
2. Find that the Defendant has violated Idaho Code § 39-7803(b)(3) of the Act by failing to certify its compliance with the Attorney General of its escrow obligations.
3. Order the Defendant, within fifteen days of entry of judgment, to place \$48,434.87 in a qualified escrow fund in order to bring the Defendant into compliance with Idaho Code § 39-7803(b)(1) of the Act, and to certify its compliance to the Attorney General.

4. Order the Defendant, within fifteen days of entry of judgment, to provide Plaintiff with a list of the names of all cigarette brands manufactured by Grand River, as well as cigarette sales information and supporting documentation for sales in Idaho in 2001.

5. Grant preliminary and permanent injunctive relief ordering that the Defendant be prohibited from selling cigarettes to consumers within the State of Idaho, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, until the Defendant establishes a qualified escrow fund as defined by Idaho Code § 39-7802(f) of the Act and certifies their compliance to the Attorney General.

6. Find that the Defendant's violations of Idaho Code § 39-7803(b)(1) constitute knowing violations, for purposes of Idaho Code § 39-7803(b)(3)(B) of the Act, and award judgment against the Defendant for civil penalties in the amount of 300% of the escrow amounts improperly withheld, for a total of \$145,304.61.


7. In the alternative, if the Court finds that the Defendant's violations were not knowing violations, award judgment against the Defendant for civil penalties in the amount of 100% of the escrow amounts improperly withheld, for a total of \$48,434.87.

8. Award judgment against the Defendant for all of the Attorney General's reasonable costs, expenses, and attorney's fees in bringing this action, as authorized by Idaho Code § 39-7803(b)(4).

9. Award the Attorney General such other, further, or different relief, as the Court considers appropriate.

**DATED this 9th day of July, 2002.**

**ALAN G. LANCE  
ATTORNEY GENERAL  
STATE OF IDAHO**

By:   
**BRETT T. DeLANGE**  
**Deputy Attorney General**  
**Consumer Protection Unit**

VERIFICATION

STATE OF IDAHO                    )  
  ) ss.  
County of Ada                    )

MELODY R. WHIGAM, being first duly sworn on oath, deposes and says that she is an Investigator in the Civil Litigation Division of the Office of the Attorney General, that she has read the foregoing Verified Complaint, and that the facts therein are true to the best of her knowledge, information, and belief.

Melody R. Whigam  
MELODY R. WHIGAM  
Investigator

SUBSCRIBED AND SWORN to before me this 9<sup>th</sup> day of July, 2002.



Lorraine L. Byerly  
NOTARY  
Residence: Boise, ID  
Commission Expires: 8/9/2004

ALAN G. LANCE  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Unit  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State St., Lower Level  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
ALAN G. LANCE, Attorney General

Plaintiff,

vs.

GRAND RIVER ENTERPRISES, a foreign  
corporation,

Defendant.

Case No. CV OC 0205249M

DEFAULT JUDGMENT

The Defendant, Grand River Enterprises, having been properly served, has failed to plead or otherwise defend within the time required. The Plaintiff, State of Idaho, has made application for entry of default judgment supported by the Affidavit of Failure to Plead or Otherwise Defend and the Affidavit of Brett T. DeLange in Support of Default Judgment.

**WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:**

1. The Defendant, Grand River Enterprises ("Grand River"), has violated Idaho's Tobacco Master Settlement Agreement Act (the "Act"), Idaho Code § 39-7801, et seq. by failing to establish a qualified escrow fund on behalf of the State of Idaho for cigarettes sold within the

DEFAULT JUDGMENT - 1

NO. **COPY**  
A.M. FILED P.M.

SEP 05 2002

J. DAVID NAVARRO, Clerk  
By KRISTIN M. BROWN  
DEPUTY

**EXHIBIT**

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State of Idaho for the time period of January 1, 2001 through December 31, 2001 and by failing to certify their compliance with the Attorney General of their escrow obligations.

2. The Defendant, Grand River, shall place into a qualified escrow fund the amounts required by Idaho Code § 39-7803(b)(1) of the Act on behalf of the State of Idaho for each year in which cigarettes are sold within the State of Idaho and certify their compliance to the Attorney General.

3. The Defendant, Grand River, shall be enjoined and prohibited from selling cigarettes to consumers within the State of Idaho, whether directly or through a distributor, retailer or similar intermediary or intermediaries until Defendant establishes a qualified escrow fund as defined by Idaho code § 39-7802(f) of the Act and certifies their compliance to the Attorney General.

4. Plaintiff, State of Idaho, shall be awarded judgment against Defendant, Grand River, for civil penalties in the amount of \$145,304.61.

5. Plaintiff, State of Idaho, shall be awarded judgment against Defendant, Grand River, for attorney fees and costs in the amount of \$490.00.

DATED this 4 day of September, 2002.

**MICHAEL McLAUGHLIN**

**DISTRICT JUDGE**

STATE OF IDAHO }  
COUNTY OF ADA } SS.

I, J. David Navarro, Clerk of the District Court of the Fourth Judicial District of the State of Idaho and for the County of Ada, do hereby certify that foregoing is a true and correct copy of the original of this case file. In witness whereof, I have hereunto set my hand and affixed by official seal this 22<sup>nd</sup> day

of February, 2003.  
J. DAVID NAVARRO, Clerk  
By C. Thomas, Deputy

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of September, 2002, I caused to be served a true and correct copy of the foregoing by placing a copy thereof in the United States Mail, postage prepaid, addressed to:

Brett T. DeLange  
Deputy Attorney General  
Office of the Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010

Grand River Enterprises  
6 Nations Ltd.  
Box 750  
Ohseweken, Ontario NOA 1MO  
CANADA

CLERK OF THE DISTRICT COURT

By: KRISTIN M. BROWN  
Deputy Clerk

**SEAL**



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

June 5, 2008

**VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED**

Arthur Montour, Jr.  
Native Wholesale Supply Company  
10955 Logan Road  
Perrysburg, NY 14129

P.O. Box 214  
Gowanda, NY 14070

*Re: Notice of Apparent Liability Under Idaho law—Violations of Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act)*

Dear Mr. Montour:

It has come to our attention that Seneca brand cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. (Grand River Enterprises), imported by your company and held at the Nevada International Trade Corporation, Foreign Trade Zone #89, in Las Vegas, Nevada, have been sold and shipped at your company's direction from that location to at least one purchaser in the State of Idaho, namely War Path, North 165 Hwy 95, Plummer, ID 83851.

Idaho Code § 39-8403(3) of the Complementary Act makes it unlawful for any person to sell, offer for sale, possess, acquire, hold, own, import, or cause to import for sale or distribution in Idaho cigarettes of a tobacco product manufacturer or brand family not on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho's Directory). Neither Seneca brand cigarettes nor Grand River Enterprises are listed on Idaho's Directory. Additionally, sale in Idaho of cigarettes manufactured by Grand River Enterprises, including Seneca, have been enjoined by order dated September 5, 2002, of the Fourth Judicial Court, in and for the County of Ada, State of Idaho, in the case entitled State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises, Case No. CV OC 0205249M.



# OFFICIAL USE

000067  
IDAG150811



U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
 (Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0000 9416 9173

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

6/5/04  
 Postmark  
 Here

Sent To NIWSC  
 Street, Apt. No.; or PO Box No. 10955 Logan Rd  
 City, State, ZIP+4

PS Form 3800, May 2000

See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 10955 Logan Road  
 Perrysburg NY 14129

**COMPLETE THIS SECTION ON DELIVERY**

A. Received by (Please Print Clearly) B. Date of Delivery

Tricia Thomas 6/12/02

C. Signature

X Tricia Thomas ☒ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below: ☐ No

3. Service Type

- ☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Copy from service label)

7000 1530 0000 9416 9173

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

000068  
 IDAG150810



[Track & Confirm](#)

[FAQs](#)

## Track & Confirm

### Search Results

Label/Receipt Number: 7000 1530 0000 9416 9180

Detailed Results:

- Delivered, June 09, 2008, 1:03 pm, GOWANDA, NY 14070
- Notice Left, June 09, 2008, 8:33 am, GOWANDA, NY 14070
- Arrival at Unit, June 09, 2008, 8:33 am, GOWANDA, NY 14070

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### Track & Confirm

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No FEAR Act EEO Data

FOIA



United States Postal Service  
First-Class Mail®



United States Postal Service  
First-Class Mail®

6/13/2008  
WAR PATH  
INV 10114

Nevada F.T.Z. Warehouse Withdrawal

Item #	Seneca 60's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
11060	Full Flavor H/L King	1002			7	18				25
11066	Full Flavor S/P 100					10				10
11067	Light S/P 100					10				10
11068	Ultra Lt S/P 100		5							5
11072	Full Flavor H/L 100							40		40
11073	Light H/L 100			5				10		15
11074	Ultra Lt H/L 100								15	15
11077	Menthol Ult H/L 100						5			5
Total		0	5	12	38	15	55			125

Item #	Opal 30's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
33130	Full Flavor H/L 120	1002	1006					11	15
33132	Ultra Lt H/L 120		15						15
33134	Menthol Lt H/L 120		5						5
Total		4	20	0	0	0	11		35

Zone Totals

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1002	1006	1007	1009	1010	1011		160
4	25	12	38	15	66		

Opal 30's

35

Seneca 60's

125

Grand Total

160

W01-0581647-5



IDAG152049

06/27/2008 13:30 N11C

## INVOICE/BILL OF LADING

NATIVE NATION

INVOICE #

10114

Date of Sale 12-Jun-08

Shipped Date:

Seller: Native Wholesale Supply

Sold To: War Path

PO Box 214

Purchaser: North 165 Highway 95

Gowanda, N.Y. 14070

Plummer, ID, 83851

Toll Free: 1-877-828-4833

Place of Sale: Native Wholesale Supply

Billed To: War Path

10956 Logan Rd

North 165 Highway 95

Perrysburg, NY 14129

VIA Coeur d'Alene Indian Nation

Seneca Nation Territory

☐ Shipping Charges Pending

Plummer, ID, 83851

## DESCRIPTION OF GOODS

Item Code	Item:	Case:	Quantity:	Price Per Unit:	Extension:
3134	OPAL Menthol Lt H/Lid 120's	30	✓ 5 1006	\$262.50	\$1,312.50
3132	OPAL Ultra Lt H/Lid 120	30	✓ 15 1006	\$262.50	\$3,937.50
3130	OPAL Full Flavor H/Lid 120's	30 4+11	✓ 15 1002-1011	\$262.50	\$3,937.50
1077	SENECA Menthol Ultra Lt H/L 100	60	✓ 5 1009	\$456.00	\$2,280.00
1074	SENECA Ultra Lt H/L 100	60	✓ 15 1011	\$456.00	\$6,840.00
1073	SENECA Light H/L 100	60 5-10	✓ 15 1007-1010	\$456.00	\$6,840.00
1072	SENECA Full Flavor H/L 100	60	✓ 40 1011	\$456.00	\$18,240.00 32+2+2+4
1068	SENECA Ultra Lt S/P 100's	60	✓ 5 1006	\$456.00	\$2,280.00
1087	SENECA Light S/P 100	60	✓ 10 1009	\$456.00	\$4,560.00
1066	SENECA Full Flavor S/P 100	60	✓ 10 1009	\$456.00	\$4,560.00
1060	SENECA Full Flavor H/L King	60 7+18	✓ 25 1007-1009	\$456.00	\$11,400.00

32-1522

32-1318

32-1530

32-904

32-1220

160-6494



ORIGINAL - NOT NEGOTIABLE

 **Con-way.** POSTPAID  
**GUARANTEED**

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\_\_\_\_\_

ZIP/POSTAL CODE

SPECIAL AGREEMENT: Declared Value: CAN \$ \_\_\_\_\_ per pound. (Declared value may not exceed CAN \$100,000.00 per shipment.)  
Shipper agrees to pay excess liability charge: \_\_\_\_\_ (Shipper's Initials)

(CNWW)

NUMBER OF UNITS RECEIVED ▲

U.S. DEPARTMENT OF HOMELAND SECURITY  
Bureau of Customs and Border Protection  
**ENTRY/IMMEDIATE DELIVERY**

Form Approved  
OMB No. 1515-0069

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
2255A RENAISSANCE DR STE 32  
LAS VEGAS-NV-89119  
702 895-7005

CST: 740  
WO1

18 CFR 142.3, 142.16, 142.22, 142.24

ABI CERTIFIED

1. ARRIVAL DATE 061308		2. ELECTED ENTRY DATE 061308		3. ENTRY TYPE CODE/NAME 06 F.T.Z.		4. ENTRY NUMBER WO1-0581647-5	
5. PORT 2722		6. SINGLE TRANS. BOND		7. BROKER/IMPORTER FILE NUMBER 05-81647			
		8. CONSIGNEE NUMBER 16-1609830				9. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129				11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129			
12. CARRIER CODE		13. VOYAGE/FLIGHT/TRIP		14. LOCATION OF GOODS-CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD			
15. VESSEL CODE/NAME FTZ0089							
16. U.S. PORT OF LANDING		17. MANIFEST NUMBER		18. G.D. NUMBER		19. TOTAL VALUE 23,400	
20. DESCRIPTION OF MERCHANDISE 160 CASES OF CIGARETTES							
21. ITB/LAWB CODE	22. ITB/LAWB NO. NONPRIV	23. MANIFEST QUANTITY 160	24. H.S. NUMBER 2402208000	25. COUNTRY OF ORIGIN CA	26. MANUFACTURER ID. XOGRARIV2176OHS		

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT

X

LU TRAPP ATTY-IN-FACT

PHONE NO.

702 895-7005

DATE

6/13/08

FAX 702 895-7132

29. BROKER OR OTHER GOVT. AGENCY USE

28. CBP USE ONLY

☐

OTHER AGENCY ACTION REQUIRED, NAMELY:

☐

CBP EXAMINATION REQUIRED.

☐

ENTRY REJECTED, BECAUSE:

DELIVERY  
AUTHORIZED:

SIGNATURE

DATE

ELECTRONIC ENTRY RELEASE NOTIFICATION

PORT OF LAS VEGAS, NV

I CERTIFY THAT PROPER RELEASE FOR THIS  
CARGO HAS BEEN RECEIVED FROM US CUSTOMS  
COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL LU TRAPP

DATE 6/13/08

Item #	Seneca 60's	Zone # 1006	Zone # 1007	Zone # 1013	Zone # 1014	Zone # 1015	Zone # 1016	Zone # 1017	Zone # 1019	Zone # 1020	Total
11054	Full Flavor S/P King				10						10
11055	Light S/P King				3						3
11060	Full Flavor H/L King								20		20
11061	Light H/L King								1		1
11063	Menthol H/L King								5		5
11065	Non-Filler H/L King			7				3			10
11066	Full Flavor S/P 100							10			10
11067	Light S/P 100						3				3
11068	Ultra Lt S/P 100	3									3
11070	Menthol Lt S/P 100									1	1
11072	Full Flavor H/L 100								35		35
11073	Light H/L 100			3		4					7
11074	Ultra Lt H/L 100						9	1			10
11075	Menthol H/L 100						8	8			8
11076	Menthol Light H/L 100						8				8
Total		3	0	10	13	4	20	22	61	1	134

Item #	Opal 30's	Zone # 1006	Zone # 1007	Zone # 1013	Zone # 1014	Zone # 1015	Zone # 1016	Zone # 1017	Zone # 1019	Zone # 1020	Total
33130	Full Flavor H/L 120			12							12
33131	Light H/L 120								15		15
33132	Ultra Lt H/L 120		15								15
33133	Menthol H/L 120		2								2
33134	Menthol Lt H/L 120	5									5
Total		5	17	12	0	0	0	0	15	0	49

Zone Totals

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1006	1007	1013	1014	1015	1016	1017	1019	1020			
8	17	22	13	4	20	22	76	1			183

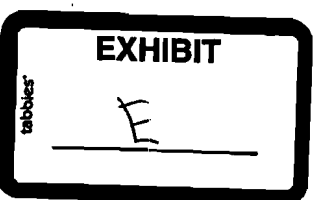
Opal 30's  
 Seneca 60's

49
134

W01-0581704-4

Grand Total

183
-----



## INVOICE/BILL OF LADING

## NATIVE NATION

INVOICE # 10368

Date of Sale 18-Jul-08

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-528-4833

Sold To: War Path  
Purchaser: North 165 Highway 85  
Plummer, ID, 83851

Place of sale: Native Wholesale Supply  
10955 Logan Rd  
Perrysburg, NY 14129

Billed To: War Path  
North 165 Highway 85

Seneca Nation Territory

☐ Shipping Charges Pending

VIA Cœur d'Alene Indian Nation  
Plummer, ID, 83851

## DESCRIPTION OF GOODS

Item Code	Item:	Case:	Quantity:	Price Per Unit:	Extension:
1072	SENECA Full Flavor H/L 100	60	✓ 35 1019	\$456.00	\$15,960.00 32+3
1055	SENECA Light S/P King	60	✓ 3 1014	\$456.00	\$1,368.00
1060	SENECA Full Flavor H/L King	60	✓ 20 1019	\$456.00	\$9,120.00
1061	SENECA Light H/L King	60	✓ 1 1019	\$456.00	\$456.00
1063	SENECA Menthol H/L King	60	✓ 5 1019	\$456.00	\$2,280.00
1065	SENECA Non Filter H/L King	60 7+3	✓ 10 1013-1017	\$456.00	\$4,560.00
1066	SENECA Full Flavor S/P 100	60	✓ 10 1017	\$456.00	\$4,560.00
1067	SENECA Light S/P 100	60	✓ 3 1016	\$456.00	\$1,368.00
1054	SENECA Full Flavor S/P King	60	✓ 10 1014	\$456.00	\$4,560.00
1070	SENECA Menthol Lt S/P 100	60	✓ 1 1020	\$456.00	\$456.00
3134	OPAL Menthol Lt H/Lid 120's	30	✓ 5 1006	\$262.50	\$1,312.50
1073	SENECA Light H/L 100	60 3+4	✓ 7 1013-1015	\$456.00	\$3,192.00
1074	SENECA Ultra Lt H/L 100	60 9+1	✓ 10 1016-1017	\$456.00	\$4,560.00
1075	SENECA Menthol H/L 100	60	✓ 8 1017	\$456.00	\$3,648.00
1076	SENECA Menthol Lt H/L 100	60	✓ 8 1016	\$456.00	\$3,648.00
3130	OPAL Full Flavor H/Lid 120's	30	✓ 12 1013	\$262.50	\$3,150.00
3131	OPAL Light H/Lid 120's	30	✓ 15 1009	\$262.50	\$3,937.50
3132	OPAL Ultra Lt H/Lid 120	30	✓ 15 1007	\$262.50	\$3,937.50
* 3133	OPAL Menthol H/Lid 120's	30	✓ 25 1007	\$262.50	\$1,312.50
1068	SENECA Ultra Lt S/P 100's	60	✓ 3 1006	\$456.00	\$1,368.00

\* 3133 OPAL MENTHOL, ONLY 2 CASES IN STOCK

32-1500  
32-1500  
32-1326  
42-1040  
24-1046  
21-722

183





**U.S. DEPARTMENT OF HOMELAND SECURITY**  
**Bureau of Customs and Border Protection**  
**ENTRY/IMMEDIATE DELIVERY**

Form Approved  
OMB No. 1515-0046

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
 2255A RENAISSANCE DR STE 32  
 LAS VEGAS-NV-89119  
 702 895-7005

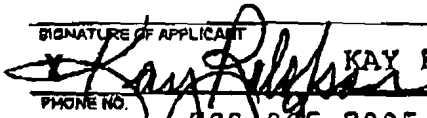
CST: 740  
 WO1

19 CFR 142.3, 142.16, 142.22, 142.24

ABI CERTIFIED

1. ARRIVAL DATE 072108		2. ELECTED ENTRY DATE 072108		3. ENTRY TYPE CODE/NAME 06 F.T.Z.		4. ENTRY NUMBER WO1-0581704-4	
5. PORT 2722		8. SINGLE TRANS. BOND		7. BROKER/IMPORTER FILE NUMBER 05-81704			
		9. CONSIGNEE NUMBER 16-1609830				8. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129				11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129			
12. CARRIER CODE		13. VOYAGE/FLIGHT/ITRIP		14. LOCATION OF GOODS CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD			
15. VESSEL CODE/NAME FTZ0089							
16. U.S. PORT OF LANDING		17. MANIFEST NUMBER		18. C.O. NUMBER		19. TOTAL VALUE 23,304	
20. DESCRIPTION OF MERCHANDISE 183 CASES OF CIGARETTES							
21. HTS CODE	22. HTS CODE NO. NONPRIV	23. MANIFEST QUANTITY 183	24. H.S. NUMBER 2402208000	25. COUNTRY OF ORIGIN CA	26. MANUFACTURER ID. XOGRARIV2176QHS		

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT  
  
 KAY ROLOFSON ATTY-IN-FACT  
 PHONE NO. 702 895-7005 DATE 7/21/08  
 FAX 702 895-7132  
 29. BROKER OR OTHER GOVT. AGENCY USE

LOT#	CASES	REF#	10368
1006	8	1020	1
1007	17		
1013	22		
1014	13		
1015	4		
1016	20		
1017	22		
1019	76		

IDAG152056

28. CBP USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

DELIVERY AUTHORIZED:	SIGNATURE	DATE
----------------------	-----------	------

ELECTRONIC ENTRY RELEASE NOTIFICATION  
 PORT OF LAS VEGAS, NV  
 I CERTIFY THAT PROPER RELEASE FOR THIS  
 CARGO HAS BEEN RECEIVED FROM US CUSTOMS  
 COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL KAY ROLOFSON  
 DATE 7/21/08

000077

017047 2003 10.20 1020030444  
NEVADA INTERNATIONAL TRADE CORP  
FTZ # 89  
PO BOX 98076  
LAS VEGAS, NV 89193  
(702) 361-3422

W 76813  
**TALLY OUT**

WAREHOUSE RELEASE

SHIP TO: NATIVE WHOLESALE SUPPLY DATE 8/21/2008  
PERRYSBURG NY LOT NO. \_\_\_\_\_  
SHIP VIA: SELF ACCOUNT NATIVE WHOLESALE

Merchandise described hereon is permitted to be transferred and has been constructively transferred to U.S. Customs and Border Protection Territory, under date of _____			U.S. CUSTOMS & BORDER PROTECTION NUMBER & ACTION	
ORDER PICKED BY	ORDER LOADED BY	POWER TO LOADING YES <input type="checkbox"/> NO <input type="checkbox"/>	W01-0581759-8 INVOICE 10553	Warehouse North 165 Hwy 95 Piemmer ID 838.51 208-686-5427
PKGS.	DESCRIPTION	WEIGHTS / MEASURES		
99 CS	CIGARETTES 4 Pallets			
Bel. Fwd. 99				
Pcs. Out 99				
Balance 0				

Signature Thomas T. Glaser Firm Name \_\_\_\_\_

SEAL NO. 4802712

Goods received must be checked at time of delivery or Warehouse will not be responsible for damages or shortages. Drivers are instructed and have no authority to make delivery of C.O.D. shipment to customers without payment in full of the charges. Any adjustments must be made through our offices. This shipment is tendered and received subject to the terms and conditions of the Receiving Carrier's Uniform Bill of Lading, effective June 15, 1941. This receipt is NOT NEGOTIABLE and if the shipment is consigned TO ORDER must be exchanged for the Company's Uniform Order Bill of Lading.

IMPORTANT: WAREHOUSE MAXIMUM LIABILITY IS 12.5 CENTS PER POUND AS OUTLINED IN FOREIGN TRADE ZONE TARIFF NO. 1

\*WHITE-ORIGINAL

\*GREEN-U.S. CUSTOMS & BORDER PROTECTION

**EXHIBIT**

tabbies  
000078

**INVOICE NO: LV76813****DATE: 08/29/2008****Due: Net 15 Days**

**Remit to:**  
**APT TRANSPORTATION, INC.**  
 P.O. Box 4668  
 Omaha, NE 68104-4668

**BILL TO**

**NATIVE WHOLESALE SUPPLY**  
**P.O. BOX 214**  
**GOWANDA NY 14070**

**Shipper**

**NITCO**  
**6620 ESCONDIDO STREET**  
**LAS VEGAS NV 89119**

**Consignee**

**WARPATH**  
**NORTH 165 HWY 95**  
**PLUMMER ID 83851**

Pickup Date	Delivery Date	Driver ID	Trailer #	Power Unit #	Bill of Lading #	PO #
8/21/2008	8/22/2008	CAVIKE	5667	1157		

Description	PCS	Weight	Rate	Distance	Charges
	99 CS			1,009.00	
CIGARETTES	4 PLTS	4000	\$0.00		\$2,310.61
FLAT FUEL SURCHARGE		1009.00		\$0.710	\$716.39
DRIVER UNLOAD		1.00		\$200.000	\$200.00
Charges SubTotal:					\$3,227.00
<b>Total Amount Owning:</b>					<b>\$3,227.00</b>

**Notes**

1/12/2009  
War Path  
Inv 11264

Nevada F.T.Z. Warehouse Withdrawal

Item #	Seneca 60's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
11060	Full Flavor H/L King	1050	1052	1053	1054	1055	1056	
11061	Light H/L King		7	18				25
11063	Menthol H/L King			10				10
11065	Non-Filter H/L King	5	3					3
11072	Full Flavor H/L 100				25			5
11075	Menthol H/L 100	7						25
11076	Menthol Light H/L 100	4		4				7
11077	Menthol Ult H/L 100		3					8
Total		16	13	32	25	0	0	86

Item #	Opal 30's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
33130	Full Flavor H/L 120	1050	1052	1053	1054	1055	1056	
33131	Light H/L 120			6		10		6
33132	Ultra Lt H/L 120						15	10
33133	Menthol H/L 120			3				15
33134	Menthol Lt H/L 120			3				3
Total		0	0	12	0	10	15	37

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1050	1052	1053	1054	1055	1056	
16	13	44	25	10	15	123

Zone Totals

37
86

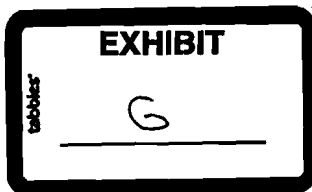
Opal 30's  
Seneca 60's

123
-----

Grand Total

Gross Kilos - 2075  
Net Kilos - 1585

1/2



**INVOICE/BILL OF LADING****NATIVE NATION****INVOICE # 11264**

Date of Sale 09-Jan-09

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-628-4833

Sold To Purchaser: War Path  
North 165 Highway 95  
Plummer, ID, 83851

*Juan.*

Place of sale: Native Wholesale Supply  
10955 Logan Rd  
Perryburg, NY 14129  
Seneca Nation Territory

Billed To: War Path  
North 165 Highway 95  
VIA Coeur d'Alene Indian Nation  
Plummer, ID, 83851

\*Not affiliated with the Seneca Nation of Indians Government\*

**DESCRIPTION OF GOODS**

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
3134	OPAL Menthol Lt H/Lid 120's	30	3 1053	\$292.50	\$877.50
3133	OPAL Menthol H/Lid 120's	30	3 <del>1054</del> 1053	\$292.50	\$877.50
3132	OPAL Ultra Lt H/Lid 120	30	15 1056	\$292.50	\$4,387.50
3131	OPAL Light H/Lid 120's	30	10 1055	\$292.50	\$2,925.00
3130	OPAL Full Flavor H/Lid 120's	30	6 1053	\$292.50	\$1,755.00
1077	SENECA Menthol Ultra Lt H/L 100	60	3 1052	\$501.00	\$1,503.00
1076	SENECA Menthol Lt H/L 100	60 4+4	8 1050-1053	\$501.00	\$4,008.00
1075	SENECA Menthol H/L 100	60	7 1050	\$501.00	\$3,507.00
1072	SENECA Full Flavor H/L 100	60	25 1054	\$501.00	\$12,525.00
1065	SENECA Non Filter H/L King	60	5 1050	\$501.00	\$2,505.00
1063	SENECA Menthol H/L King	60	3 1052	\$501.00	\$1,503.00
1061	SENECA Light H/L King	60	10 1053	\$501.00	\$5,010.00
1060	SENECA Full Flavor H/L King	60 7+18	25 1052-1053	\$501.00	\$12,525.00

## DESCRIPTION OF GOODS

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
	Total Cases Delivered	123			
	Total Cartons Delivered	6270	Add one extra handling unit to any fraction of the whole number.		Sub Total \$53,908.50
	Total Packs Delivered	62700			Shipping \$0.00
	Total Sticks Delivered	1254000	Units 3.3		Discounts \$0.00
			Gross Weight (Lbs) 4574		TOTAL THIS ORDER \$53,908.50
			Net Weight (Lbs) 3686		

## CONDITION OF SALE

THESE GOODS HAVE BEEN SOLD TO PURCHASER AT THE SENECA NATION TERRITORY. THEY ARE FOR RECEIPT ONLY AT SENECA NATION TERRITORY OR OTHER LOCATION DIRECTED BY PURCHASER, AND MAY BE TRANSPORTED BY PURCHASER ONLY AT SENECA NATION TERRITORY OR TO THE TERRITORY OF ANOTHER NATIVE NATION. PURCHASER REPRESENTS THAT THE GOODS ARE FOR RESALE AT SENECA NATION TERRITORY OR SUCH OTHER NATIVE TERRITORY TO WHICH THEY ARE TRANSPORTED. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT THESE GOODS ARE SOLD F.O.B. SENECA NATION TERRITORY. IF PHYSICAL RECEIPT OF GOODS IS TAKEN BY PURCHASER AT SENECA NATION TERRITORY, THEN F.O.B. SENECA NATION TERRITORY SHALL CONSTITUTE BOTH A PRICE TERM AND DELIVERY TERM. SHIPMENT TO ANY OTHER LOCATION SHALL BE SOLELY AT THE EXPENSE, DIRECTION, AND RESPONSIBILITY OF PURCHASER, IN WHICH EVENT F.O.B. SENECA NATION TERRITORY SHALL CONSTITUTE A PRICE TERM WITH DELIVERY DEEMED TO TAKE PLACE AT SENECA NATION TERRITORY UPON PURCHASER'S EXECUTION BELOW AND TITLE AND RISK OF LOSS TRANSFERRING TO PURCHASER PRIOR TO THEIR REMOVAL FROM A FREE TRADE ZONE OR U.S. CUSTOMS BONDED WAREHOUSE IF PURCHASER OR PURCHASER'S AGENT TAKE POSSESSION OF GOODS AT SUCH FREE TRADE ZONE OR CUSTOMS BONDED WAREHOUSE. PURCHASER CONFIRMS THAT IT IS AUTHORIZED TO PURCHASE AND RECEIVE THE GOODS UNDER THE TERMS AND CONDITION IN WHICH THEY ARE SOLD AND RECEIVED.

Signature

x *A. Kananika* 11/29/09 LEADER

## ACKNOWLEDGMENT

Purchaser's or purchaser's agent's signature below hereby acknowledges delivery and receipt of the above described goods according to the terms hereof on this \_\_\_\_\_ day of \_\_\_\_\_, 2008

Signature

x \_\_\_\_\_

11264

## BILL OF LADING:

Product Class: 85

Product: Tobacco

Stackable

Purchaser's Transport Destination Purchaser's Transporter:

Per Customer: War Path

PICKUP/ SELF

Foreign Trade Zone or

Customs Bonded Whse

Transporter Information:

Volume Disc. Track#:

Shipper Pro#:

Web Address:

Please allow 5 to 7 days for shipping

(does not include holidays or weekends)

(208) 686-5427

NEVADA INTERNATIONAL TRADE CORP  
FTZ # 89  
PO BOX 98076  
LAS VEGAS, NV 89193  
(702) 361-3422

# TALLY OUT

WAREHOUSE RELEASE

SHIP TO: War Path	DATE 1/22/2009
NORTH 165 HIGHWAY 95	LOT NO.
PLUMMER, ID, 83851	ACCOUNT Native Wholesale
SHIP VIA: SELF	

Merchandise described hereon is permitted to be transferred and has been constructively transferred to U.S. Customs and Border Protection Territory, under date of \_\_\_\_\_

U.S. CUSTOMS & BORDER PROTECTION NUMBER & ACTION

ORDER PICKED BY	ORDER LOADED BY	POWER TO LOADING
		YES <input type="checkbox"/> NO <input type="checkbox"/>

INV #11264

BPM-0006753-3

PKGS.	DESCRIPTION	WEIGHTS / MEASURES
123 cs	Cigarettes	4574 LBS
Bal. Fwd. 123		
Pcs. Out 123		
Balance 0		

Signature A. Rosmiller

Firm Name LEADER 1/22/09

SEAL NO.

Goods received must be checked at time of delivery or Warehouse will not be responsible for damages or shortages. Drivers are instructed and have no authority to make delivery of C.O.D. shipment to customers without payment in full of the charges. Any adjustments must be made through our offices. This shipment is tendered and received subject to the terms and conditions of the Receiving Carrier's Uniform Bill of Lading, effective June 15, 1941. This receipt is NOT NEGOTIABLE and if the shipment is consigned TO ORDER must be exchanged for the Company's Uniform Order Bill of Lading.

\*IMPORTANT. WAREHOUSE MAXIMUM LIABILITY IS 12.5 CENTS PER POUND AS OUTLINED IN FOREIGN TRADE ZONE TARIFF NO. 1

\*WHITE-ORIGINAL

\*GREEN-U.S. CUSTOMS & BORDER PROTECTION

000083



Form Approved  
OMB No. 1651-0024

FILED CODE: BRM  
ABI CERTIFIED

1. ARRIVAL DATE 01/21/2009		2. ELECTED ENTRY DATE 012109		3. ENTRY TYPE CODE / NAME 06 ABI/A		4. ENTRY NUMBER BRM-0006753-3	
5. PORT 2722		6. SINGLE TRANS. BOND		7. BROKER / IMPORTER FILE NUMBER 8690			
		8. CONSIGNEE NUMBER 82-0537082				9. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME WARPATH CORPORATION 165 NORTH HIGHWAY 95 PLUMMER ID 83851				11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO. 10955 LOGAN RD. PERRYSBURG NY 141299775			
12. CARRIER CODE		13. VOYAGE/FLIGHT/TRIP		14. LOCATION OF GOODS-CODE(S)/NAME(S) Z179 - FTZ 89 - NEV.NAT'L TRAD. - 6620 ESCONDIDO STE E - LAS VEGAS, NV			
15. VESSEL CODE/NAME LOT #							
16. US PORT OF UNLADING		17. MANIFEST NUMBER		18. G.O. NUMBER		19. TOTAL VALUE 18,075	
20. DESCRIPTION OF MERCHANDISE PAPER-WRAP CIGRETS CONT TOBACO							
21. IT/BL/AWB CODE	22. IT/BL/AWB NO.	23. MANIFEST QUANTITY	24. H.S. NUMBER	25. COUNTRY OF ORIGIN	26. MANUFACTURER NO.		
M	NONPRIV	123 PCS	2402.20.8000	XO	XOGRARIV2176OHS		

## 28. CBP USE ONLY

☐ ENTRY REJECTED, BECAUSE:

ELECTRONIC ENTRY RELEASE NOTIFICATION. PORT OF 2722. I certify that proper release for this cargo has been received from U.S. Customs.  
Date: 01/21/01 JAMES L. KINNEY CHB, INC.  
Signature: [Signature]

CBP Form 3461 (01/89)

000084

Nevada F.T.Z. #89 Warehouse Withdrawal

Company	War Path
Invoice #	11315

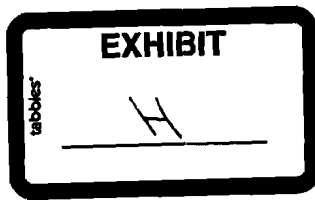
Item #	Zone #	1047	1048	1049	1050	1051	1052	1053	1054	Zone #	Total
Seneca 60's	1047										
11060 Full Flavor H/L King					1	4				1056	35
11061 Light H/L King			1						9		10
11062 Ultra Lt H/L King											0
11063 Menthol H/L King							3				3
11064 Menthol Light H/L King											0
11065 Non-Filter H/L King								5			5
11072 Full Flavor H/L 100							7		28		35
11073 Light H/L 100				5				8	7		20
11074 Ultra Lt H/L 100				5			5				10
11075 Menthol H/L 100	2										2
11076 Menthol Light H/L 100					3			5			8
11077 Menthol Ult H/L 100							2				2
Total	2	1	10	4	4	4	17	18	44	30	130

Item #	Opal 30's	Zone # 1047	Zone # 1048	Zone # 1049	Zone # 1050	Zone # 1051	Zone # 1052	Zone # 1053	Zone # 1054	Zone # 1056	Total
33130	Full Flavor H/L 120							5			5
33131	Light H/L 120									5	5
33132	Ultra Lt H/L 120	0								5	5
33133	Menthol H/L 120							3			3
33134	Menthol Lt H/L 120									3	3
	Total	0	0	0	0	0	0	8	0	13	21

	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
	1047	1048	1049	1050	1051	1052	1053	
Zone Totals	2	1	10	4	4	17	26	151

Opal 30's	21
Seneca 120's	130

Grand Total	151
-------------	-----



## INVOICE/BILL OF LADING

## NATIVE NATION

INVOICE # 11315

Date of Sale 23-Jan-08

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-828-4833

Sold To War Path  
Purchaser: North 165 Highway 95  
Plummer, ID, 83851

Place of sale: Native Wholesale Supply  
10955 Logan Rd  
Perrysburg, NY 14129  
Seneca Nation Territory

Billed To: War Path  
North 165 Highway 95  
VIA Coeur d'Alene Indian Nation  
Plummer, ID, 83851

\*Not affiliated with the Seneca Nation of Indians Government\*

## DESCRIPTION OF GOODS

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
3134	OPAL Menthol Lt H/Lid 120's 1056	30	3	\$292.50	\$877.50
3133	OPAL Menthol H/Lid 120's 1053	30	3	\$292.50	\$877.50
3132	OPAL Ultra Lt H/Lid 120 1050	30	5	\$292.50	\$1,462.50
3131	OPAL Light H/Lid 120's 1056	30	5	\$292.50	\$1,462.50
3130	OPAL Full Flavor H/Lid 120's 1053	30	5	\$292.50	\$1,462.50
1077	SENECA Menthol Ultra Lt H/L 100 2-1053	60	2	\$501.00	\$1,002.00
1076	SENECA Menthol Lt H/L 100 2-1053	60	8	\$501.00	\$4,008.00
1075	SENECA Menthol H/L 100 1047	60	2	\$501.00	\$1,002.00
1074	SENECA Ultra Lt H/L 100 5-1052	60	10	\$501.00	\$5,010.00
1073	SENECA Light H/L 100 4-1053	60	20	\$501.00	\$10,020.00 (26)
1072	SENECA Full Flavor H/L 100 2-1053	60	35	\$501.00	\$17,535.00 (32) (3)
1065	SENECA Non Filter H/L King 2-1053	60	5	\$501.00	\$2,505.00
X 1063	SENECA Menthol H/L King 1052	60	3	\$501.00	\$1,503.00
1061	SENECA Light H/L King 4-1053	60	10	\$501.00	\$5,010.00
1060	SENECA Full Flavor H/L King 4-1053	60	35	\$501.00	\$17,535.00 (32) (3)

1130

526

1124

1340

954

1576

NEVADA INTERNATIONAL TRADE CORP  
FTZ # 89  
PO BOX 98076  
LAS VEGAS, NV 89193  
(702) 361-3422

# TALLY OUT

WAREHOUSE RELEASE

SHIP TO: WAR PATH DATE 1/28/2009  
NORTH 165 HIGHWAY 95 LOT NO. \_\_\_\_\_  
PLUMMER, ID 83851 ACCOUNT NATIVE WHOLESALE  
SHIP VIA: WILL CALL

Merchandise described hereon is permitted to be transferred and has been constructively transferred to U.S. Customs and Border Protection Territory, under date of \_\_\_\_\_

U.S. CUSTOMS & BORDER PROTECTION NUMBER & ACTION

ORDER  
PICKED BY

ORDER  
LOADED BY

POWER TO LOADING

YES  
☐

NO  
☐

INVOICE # 11315

PIECES

DESCRIPTION

SKIDS

151 CASES

CIGARETTES

6596#

Bal. Fwd. \_\_\_\_\_

Pcs. Out \_\_\_\_\_

Balance \_\_\_\_\_

Signature A. Karamich

Firm Name LEADER 1/29/09

SEAL NO. 4849144

Goods received must be checked at time of delivery or Warehouse will not be responsible for damages or shortages. Drivers are instructed and have no authority to make delivery of C.O.D. shipment to customers without payment in full of the charges. Any adjustments must be made through our offices. This shipment is tendered and received subject to the terms and conditions of the Receiving Carrier's Uniform Bill of Lading, effective June 15, 1941. This receipt is NOT NEGOTIABLE and if the shipment is consigned TO ORDER must be exchanged for the Company's Uniform Order Bill of Lading.

\*IMPORTANT. WAREHOUSE MAXIMUM LIABILITY IS 12.5 CENTS PER POUND AS OUTLINED IN FOREIGN TRADE ZONE TARIFF NO. 1

000087

Form Approved  
OMB No. 1651-0024

FILER CODE: BRM  
ABI CERTIFIED

Page 1 of 1

<b>27. CERTIFICATION</b>		<b>28. CBP USE ONLY</b>	
I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.		<input type="checkbox"/> OTHER AGENCY ACTION REQUIRED, NAMELY:	
SIGNATURE OF APPLICANT <b>X</b> JAMES L. KINNEY CHB, INC., ATTY-IN-FACT		<input type="checkbox"/> CBP EXAMINATION REQUIRED.	
PHONE NO. (702) 691-2911	DATE 01/28/2009	<input type="checkbox"/> ENTRY REJECTED, BECAUSE:	
29. BROKER OR OTHER GOVT AGENCY USE			
DELIVERY AUTHORIZED:		SIGNATURE	DATE
ELECTRONIC ENTRY RELEASE NOTIFICATION. PORT OF 2722. I certify that proper release for this cargo has been received from U.S. Customs.			
Date: 01/28/09		JAMES L. KINNEY CHB, INC.	
Signature: [Signature]		[Signature]	

Req. Exam At:  
Transfer By:  
Entry Bond [ ] Carrier Bond [ ] CHL Bond [ ] CFS Bond [ ]  
Paired Cities Req: Yes [ ] No [X]

PAPERWORK REDUCTION ACT NOTICE: This information is to determine the admissibility of imports into the United States and to provide the necessary information for the examination of the cargo and to establish the liability for payment of duties and taxes. Your response is necessary. The estimated average burden associated with this collection of information is 15 minutes per respondent depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to Bureau of Customs and Border Protection, Information Services Branch, Washington, DC 20229, and to the Office of Management and Budget, Paperwork Reduction Project (1651-0024), Washington, DC

000088

**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS	TOTAL
2004	12-Feb	OPAL 30	40	240,000	
		SENECA 50	160	1,600,000	
		SENECA 60	95	1,140,000	2,980,000
2004	5-Apr	OPAL 30	45	270,000	
		SENECA 50	200	2,000,000	
		SENECA 60	100	1,200,000	3,470,000
2004	24-May	OPAL 30	30	180,000	
		SENECA 50	180	1,800,000	
		SENECA 60	105	1,260,000	3,240,000
2004	13-Jul	OPAL 30	55	330,000	
		SENECA 50	170	1,700,000	
		SENECA 60	90	1,080,000	3,110,000
2004	9-Aug	OPAL 30	0	0	
		SENECA 50	145	1,450,000	
		SENECA 60	155	1,860,000	3,310,000
2004	5-Oct	OPAL 30	40	240,000	
		SENECA 50	160	1,600,000	
		SENECA 60	140	1,680,000	3,520,000
2004	24-Nov	OPAL 30	25	150,000	
		SENECA 50	122	1,220,000	
		SENECA 60	100	1,200,000	2,570,000
2004	31-Dec	OPAL 30	5	30,000	
		SENECA 50	110	1,100,000	
		SENECA 60	110	1,320,000	2,450,000
<b>2004 TOTAL</b>					<b>24,650,000</b>



# **NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS	ENTRY	TOTAL
2005	11-Feb	OPAL 30	53	318,000		
		SENECA 50	0	0		
		SENECA 60	0	0		318,000
2005	3-Mar	OPAL 30	85	510,000		
		SENECA 50	0	0		
		SENECA 60	0	0		510,000
2005	11-Apr	OPAL 30	19	114,000		
		SENECA 50	70	700,000		
		SENECA 60	235	2,820,000		3,634,000
2005	26-May	OPAL 30	30	180,000		
		SENECA 50	35	350,000		
		SENECA 60	130	1,560,000		2,090,000
2005	29-Jun	OPAL 30	5	30,000		
		SENECA 50	61	610,000		
		SENECA 60	179	2,148,000		2,788,000
2005	1-Aug	OPAL 30	28	168,000		
		SENECA 50	50	500,000		
		SENECA 60	220	2,640,000		3,308,000
2005	14-Sep	OPAL 30	43	258,000		
		SENECA 50	145	1,450,000		
		SENECA 60	100	1,200,000		2,908,000
2005	14-Oct	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	20	240,000		240,000
2005	17-Oct	OPAL 30	50	300,000		
		SENECA 50	0	0		
		SENECA 60	230	2,760,000		3,060,000
2005	8-Dec	OPAL 30	55	330,000		
		SENECA 50	0	0		
		SENECA 60	185	2,220,000		2,550,000
2005 TOTAL						21,406,000

**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS ENTRY TOTAL	
2006	17-Jan	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	100	1,200,000	1,200,000
2006	19-Jan	OPAL 30	35	210,000	
		SENECA 50	0	0	
		SENECA 60	185	2,220,000	2,430,000
2006	22-Mar	OPAL 30	40	240,000	
		SENECA 50	0	0	
		SENECA 60	305	3,660,000	3,900,000
2006	22-May	OPAL 30	60	360,000	
		SENECA 50	0	0	
		SENECA 60	240	2,880,000	3,240,000
2006	1-Aug	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	230	2,760,000	2,760,000
2006	21-Aug	OPAL 30	75	450,000	
		SENECA 50	0	0	
		SENECA 60	0	0	450,000
2006	22-Aug	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	30	360,000	360,000
2006	13-Sep	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	275	3,300,000	3,300,000
2006	30-Oct	OPAL 30	45	270,000	
		SENECA 50	0	0	
		SENECA 60	145	1,740,000	2,010,000
2006	21-Dec	OPAL 30	40	240,000	
		SENECA 50	0	0	
		SENECA 60	245	2,940,000	3,180,000
<b>2006 TOTAL</b>				<b>22,830,000</b>	



**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS	ENTRY	TOTAL
2007	5-Jan	OPAL 30	30	180,000		
		SENECA 50	0	0		
		SENECA 60	270	3,240,000		3,420,000
2007	6-Mar	OPAL 30	60	360,000		
		SENECA 50	0	0		
		SENECA 60	230	2,760,000		3,120,000
2007	12-Apr	OPAL 30	30	180,000		
		SENECA 50	0	0		
		SENECA 60	280	3,360,000		3,540,000
2007	5-Jun	OPAL 30	50	300,000		
		SENECA 50	0	0		
		SENECA 60	116	1,392,000		1,692,000
2007	27-Jul	OPAL 30	45	270,000		
		SENECA 50	0	0		
		SENECA 60	260	3,120,000		3,390,000
2007	28-Jun	OPAL 30	25	150,000		
		SENECA 50	0	0		
		SENECA 60	165	1,980,000		2,130,000
2007	31-Jul	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	10	120,000		120,000
2007	13-Sep	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	185	2,220,000		2,220,000
2007	2-Oct	OPAL 30	35	210,000		
		SENECA 50	0	0		
		SENECA 60	10	120,000		330,000
2007	22-Oct	OPAL 30	15	90,000		
		SENECA 50	0	0		
		SENECA 60	220	2,640,000		2,730,000
2007	6-Dec	OPAL 30	10	60,000		
		SENECA 50	0	0		
		SENECA 60	148	1,480,000		
		SENECA 120	35	210,000		1,750,000
<b>2007 TOTAL</b>						<b>24,442,000</b>

# **NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS ENTRY TOTAL	
2008	12-Feb	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	89	1,068,000	
		SENECA 120	18	108,000	1,176,000
2008	11-Mar	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	112	1,344,000	
		SENECA 120	0	0	1,344,000
2008	12-Mar	OPAL 30	20	120,000	
		SENECA 50	0	0	
		SENECA 60			
		SENECA 120	17	102,000	222,000
2008	8-Apr	OPAL 30	17	102,000	
		SENECA 50	0	0	
		SENECA 60	80	800,000	
		SENECA 120	0	0	902,000
2008	13-May	OPAL 30	16	96,000	
		SENECA 50	0	0	
		SENECA 60	130	1,300,000	
		SENECA 120	0	0	1,396,000
2008	13-Jun	OPAL 30	35	210,000	
		SENECA 50	0	0	
		SENECA 60	125	1,250,000	
		SENECA 120	0	0	1,460,000
2008	21-Jul	OPAL 30	49	294,000	
		SENECA 50	0	0	
		SENECA 60	134	1,340,000	
		SENECA 120	0	0	1,634,000
2008	21-Aug	OPAL 30	0	0	
		SENECA 50	0	0	
		SENECA 60	92	920,000	
		SENECA 120	7	42,000	962,000
2008	16-Sep	OPAL 30	31	186,000	
		SENECA 50	0	0	
		SENECA 60	237	2,370,000	
		SENECA 120	0	0	2,556,000
2008	6-Nov	OPAL 30	50	300,000	
		SENECA 50	0	0	
		SENECA 60	220	2,200,000	
		SENECA 120	0	0	2,500,000
2008 TOTAL TO DATE				14,152,000	

# **NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS ENTRY TOTAL	
2009	12-Jan	OPAL 30	37	222,000	
		SENECA 50	0	0	
		SENECA 60	86	860,000	
		SENECA 120	0	0	1,082,000
2009	26-Jan	OPAL 30	21	126,000	
		SENECA 50	0	0	
		SENECA 60	130	1,300,000	
		SENECA 120	0	0	1,426,000
2009 TOTAL TO DATE					2,508,000
TOTAL SHIPPED 2004 TO DATE					109,988,000

**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL  
STATE OF IDAHO

**BRETT DELANGE, ISB #3628**

Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 West Jefferson, 2<sup>nd</sup> Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424  
Facsimile: (208) 334-4151  
[brett.delange@ag.idaho.gov](mailto:brett.delange@ag.idaho.gov)

**Attorneys for the State of Idaho**

**THEODORE V. SPANGLER, JR., ISB #1318**

Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844  
[tspangler@tax.idaho.gov](mailto:tspangler@tax.idaho.gov)

**Attorneys for the Idaho State Tax Commission**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**NOTICE OF HEARING**

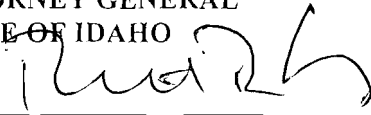
To: Defendant Native Wholesale Supply Company and its counsel of record:

Plaintiffs The State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission, (collectively "the State"), hereby give notice that the State will bring the State's Motion for Preliminary Injunction for hearing before the Honorable Timothy L. Hansen, Ada County District Court Judge, on the 21<sup>st</sup> day of May, 2009, at 4:00 p.m (MDT) or as soon thereafter as counsel can be heard.

DATED this 15<sup>th</sup> day of April, 2009.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

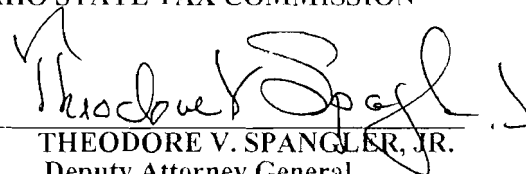
By



BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

IDAHO STATE TAX COMMISSION

By



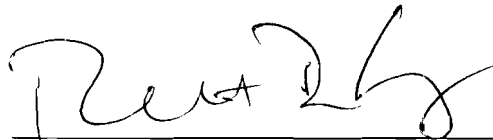
THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of April, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



BRETT T. DELANGE  
Deputy Attorney General

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& MCKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 4:50

MAY 06 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney General;  
and the IDAHO STATE TAX COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY COMPANY,  
a corporation; and Does 1 through 20,

Defendants.

Case No. CV OC 0815228

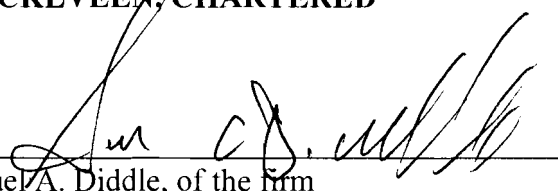
**DEFENDANT'S MOTION FOR**  
**CONTINUATION OF HEARING**  
**ON THE STATE'S MOTION FOR**  
**PRELIMINARY INJUNCTION**

COMES NOW Native Wholesale Supply Company, ("NWS"), by and through its attorney of record, Samuel A. Diddle of the law firm of Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., making a special appearance without waiving its right to contest personal jurisdiction, and asks this Court to continue the hearing on Plaintiffs' Motion for Preliminary Injunction until after the Court reviews and determines Defendant's Motion to Dismiss for Lack of Personal Matter Jurisdiction over Defendant pursuant to Rule 12(b), I.R.C.P.

Defendant previously filed its Motion to Dismiss pursuant to Rule 12(b), I.R.C.P. It is essential that the Court determine whether it has jurisdiction over the subject matter of Plaintiffs' Complaint or personal jurisdiction over Defendant before it considers the substance of the Plaintiffs' Motion for Preliminary Injunction. Accordingly, NWS, without waiving its right to contest personal jurisdiction, asks this Court to delay any hearing on Plaintiffs' Motion for Preliminary Injunction until after it has had a chance to rule on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Personal Jurisdiction.

DATED this 4 day of May, 2009.

**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

By   
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company



**CERTIFICATE OF SERVICE**

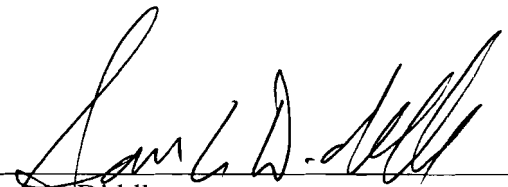
I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 4 day of May, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
P.O. Box 36  
Boise, ID 83720-0410

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax

  
\_\_\_\_\_  
Samuel A. Diddle

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& MCKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:50  
FILED  
MAY 06 2009  
J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney General;  
and the IDAHO STATE TAX COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY COMPANY,  
a corporation; and Does 1 through 20,

Defendants.

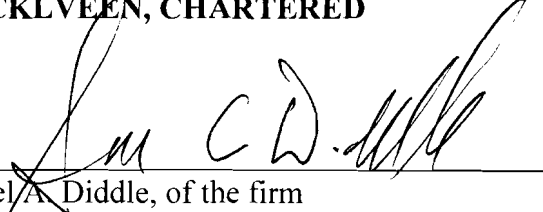
Case No. CV OC 0815228

**DEFENDANT'S MOTION TO**  
**DISMISS FOR LACK OF**  
**SUBJECT MATTER AND**  
**PERSONAL JURISDICTION**

COMES NOW Native Wholesale Supply Company, ("NWS"), by and through its attorney of record, Samuel A. Diddle of the law firm of Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and submits this motion pursuant to Rule 12(b), I.R.C.P. seeking dismissal of the Complaint for lack of subject matter jurisdiction and personal jurisdiction over the Defendant and for failure to state a claim upon which relief can be granted. This Motion is supported by a Memorandum submitted concurrently herewith and the Affidavit of Arthur Montour.

DATED this 6 day of May, 2009.

**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

By   
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

**CERTIFICATE OF SERVICE**

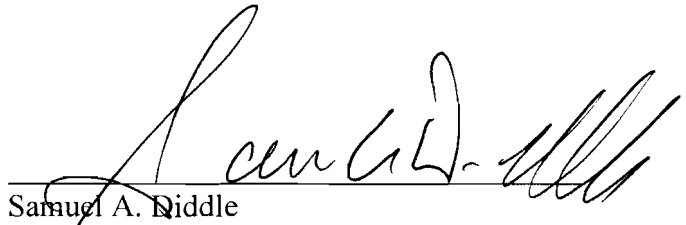
I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 4 day of May, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
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Len B. Jordan Building  
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Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
P.O. Box 36  
Boise, ID 83720-0410

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax

  
\_\_\_\_\_  
Samuel A. Niddle

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:50

MAY 06 2003

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S MEMORANDUM**  
**IN SUPPORT OF MOTION TO**  
**DISMISS FOR LACK OF**  
**PERSONAL JURISDICTION,**  
**SUBJECT MATTER**  
**JURISDICTION, AND FOR**  
**FAILURE TO STATE A CLAIM**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Memorandum in support of its Motion to Dismiss pursuant to Rules 12 (b)(1), 12(b)(2) and 12 (b)(6), I.R.C.P.

ORIGINAL

The action should be dismissed because this Court does not have subject matter jurisdiction, because NWS is not subject to personal jurisdiction in Idaho, and because Plaintiffs have failed to state a claim upon which relief can be granted.

NWS is a corporation chartered by the Sac and Fox Tribe. NWS is not domiciled in Idaho, and does not have the minimum contacts necessary with Idaho to subject NWS to the jurisdiction of Idaho courts. Plaintiffs have failed to establish any basis upon which the Court may exercise subject matter jurisdiction and Idaho has no right to extend its jurisdiction to sales of cigarettes on tribal land to tribal members.

NWS sells cigarettes from its office on the Seneca Nation of Indians Territory in northern New York, with all sales being on a F.O.B. Seneca Nation basis. Title to the cigarettes and risk of loss is passed to the purchaser at the time the transaction is consummated on the Seneca Nation of Indians Territory. NWS has no control over what purchasers may do with the cigarettes subsequent to the sale. NWS directs no commercial activity toward Idaho and does not transact any business here.

## **I.**

### **FACTUAL BACKGROUND**

The Complaint generally alleges that NWS is illegally selling, distributing or importing cigarettes in Idaho and seeks to enjoin NWS from continuing its actions and also seeks the imposition of monetary sanctions. NWS submits its Motion to Dismiss based on the following uncontroverted facts:

In or around 2001, NWS was chartered as a corporation by the Sac and Fox Tribe of Oklahoma. (Montour Aff. ¶ 2). NWS's office has always been located on Seneca Nation of Indians Territory in northern New York. (*Id.*) NWS has no other office. (*Id.*)

The primary business of NWS is the importation and sale of tobacco products. (Montour Aff. ¶ 3) NWS imports cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. (“Grand River”) for resale to third parties. (*Id.*) Grand River is wholly owned by Native Americans who are members of the Six Nations that comprise the Iroquois Confederacy. (*Id.*) Grand River is a Canadian corporation that produces, packages and sells tobacco products. (*Id.*) Grand River’s facility is located on the Grand River Reserve in Oshweken, Ontario, Canada. (*Id.*)

NWS purchases and imports cigarettes from Grand River that are shipped to their ultimate destination on Indian territory in the United States via one of three facilities: (a) the Western New York Foreign Trade Zone in Lackawanna, New York; (b) the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; and (c) a bonded warehouse on the Seneca Nation of Indians Territory in New York. (Montour, Aff. ¶ 4) NWS does not own any of these facilities, but merely rents space to store the cigarettes after they pass through Customs. (*Id.*)

As mentioned above, NWS resells the cigarettes only to tribes or entities in the United States that are located on tribal land and owned by Native Americans. Cigarettes are sold only to tribes or entities that are located on trust land and which are owned by individuals who are enrolled members of federally recognized tribes. (Montour Aff. ¶ 5). All orders are placed and processed at NWS’s office on the Seneca Nation of Indians Territory. (*Id.*) All checks or other forms of payment are remitted or forwarded to NWS’s office. (*Id.*) All cigarettes sold by NWS are in packages that are stamped “for reservation sales only.” (*Id.*)

All cigarettes sold by NWS are (and have always been) sold at all times on an F.O.B. Seneca Nation of Indians Territory basis, with title and risk of loss transferring to the purchaser at the time of sale on the Seneca Nation of Indians Territory. (Montour Aff. ¶ 6) Once a transaction is completed, products are shipped via one of the three aforementioned facilities. (*Id.*) NWS does not exercise any

control over its products subsequent to their sale to third parties. (*Id.*) NWS does not sell or import any cigarettes into the State of Idaho. (*Id.*) Any transport of products into Idaho occurs solely as a result of a third party's conduct or direction. (*Id.*)

As stated above, NWS is a corporation chartered by the Sac and Fox Tribe, with its place of business on the Seneca Nation of Indians Territory in New York. (Montour Aff. ¶ 7) NWS has no presence in Idaho, and does not do or transact business in Idaho. (*Id.*) Specifically, NWS does not sell products within the jurisdiction of the State of Idaho, nor has it ever contracted to do so; NWS does not maintain any place of business in Idaho; NWS has no personnel, office, real estate, sales agents, mailing address or bank account in Idaho; NWS does not advertise or solicit business in Idaho; NWS does not have a telephone number or listing in Idaho; and NWS does not own or have a registered automobile in Idaho. (*Id.*)

## II.

### **LEGAL ARGUMENT**

#### **A. Because NWS has no minimum contacts with Idaho, the Court may not exercise personal jurisdiction.**

A plaintiff must make a prima facie showing of jurisdictional facts. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9<sup>th</sup> Cir. 1990). Because the uncontroverted facts demonstrate that NWS has no minimum contacts with Idaho, Plaintiffs cannot make a *prima facie* showing and have failed to carry their burden.

Under Idaho law, a court may exercise jurisdiction over an out-of-state defendant where: (1) the act giving rise to the cause of action falls within Idaho's longarm statute and (2) the constitutional standards of due process must be met. *Blimka v. MyWeb Wholesaler, LLC*, 143 Idaho 723, 726, 152 P.3d 594, 597 (2007); *Smalley v. Kaiser*, 130 Idaho 909, 950 P.2d 1248, 1251 (1997). Because Idaho's longarm statute permits courts to assert personal jurisdiction to the same extent permitted by the due process clause of the Constitution, courts are required to decide whether asserting personal



jurisdiction complies with due process under Idaho law. *Schneider v. Sverdsten Logging Co.*, 104 Idaho 210, 211, 657 P.2d 1078, 1079 (1983).

Due process requires that a nonresident defendant have minimum contacts with the forum state of such a nature that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In determining the existence of minimum contacts, the court must focus on the relationship among the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579-80, 53 L.Ed.2d 683, 697-98 (1977). If the court finds the requisite minimum contacts, it must then proceed to determine whether its assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528, 543 (1985).

Not just any contacts with Idaho will suffice to sustain the exercise of jurisdiction. The United States Supreme Court has described the idea of minimum contacts as “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” For specific personal jurisdiction, the ensuing litigation must arise out of or relate to the contacts. Whether there have been sufficient contacts must be determined on a case-by-case basis.

*Western States Equipment Co. v. American Annex, Inc.*, 125 Idaho 155, 158, 868 P.2d 483, 486 (1994).

In *Western States*, the Idaho Supreme Court also pointed out that the United States Supreme Court has ruled that the contacts must be sufficient that the Defendants could “reasonably anticipate being haled into court” in the forum state. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 287, 100 S.Ct. 559, 562, 62 L.Ed.2d 490 (1980)). The analysis of the due process implications of subjecting NWS to Idaho’s jurisdiction does not end there, however.

The due process analysis is a two-step process. Once a court determines that the requisite minimum contacts with the forum state exists, the court must then consider the contacts in light of other factors

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to determine whether the assertion of personal jurisdiction would comport with “traditional notions of fair play and substantial justice.” This analysis permits the court to consider:

- (1) “the burden on the Defendant,”
- (2) “the forum State’s interest in adjudicating the dispute,”
- (3) “the plaintiff’s interest in obtaining convenient and effective relief,”
- (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and
- (5) “the shared interest of the several states in furthering fundamental substantive social policies.”

*Western States*, 125 Idaho at 158-59, 868 P.2d at 486-87 (citations omitted).

In *Smalley v. Kaiser*, 130 Idaho 909, 950 P.2d 1248 (1997), the Supreme Court using the *Western State’s* guidelines, analyzed whether an Idaho resident could bring in the Missouri Department of Social Services, which had filed delinquency reports in Idaho and undertaken collection efforts in Idaho against the Idaho resident. The Court concluded that the Department and its employees had insufficient minimum contacts with Idaho, and in addition that it would violate fair play and substantial justice if Idaho courts exercised jurisdiction. It balanced the interest of Idaho against the burden to the Department to defend in Idaho in its decision.

Similarly, in the present case it would offend traditional notions of fair play and substantial justice to subject NWS to Idaho jurisdiction. There are no substantial or continuous or systematic contacts by NWS with Idaho.

NWS is chartered by the Sac and Fox Tribe, and is wholly owned by Mr. Montour, a member of the Seneca Nation. Since its inception, NWS has maintained its business operations on the Seneca Nation of Indians Territory. NWS does not have an office, employ personnel, maintain a mailing address, use bank accounts, utilize sale agents, have a telephone number or listing, or market its goods in Idaho. Nor does NWS own real estate or an automobile in Idaho. In short, NWS totally lacks any contacts in Idaho that would warrant the exercise of general jurisdiction.

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Moreover, NWS has never purposefully availed itself of the benefits or protections of Idaho. NWS does not purposefully direct its business activities toward, or within, the jurisdiction of the State of Idaho. NWS does not sell products specifically for markets within Idaho, nor does it advertise within Idaho. NWS does not have agreements with persons or companies to serve as sales agents in Idaho for cigarettes that NWS sells. It has no offices in Idaho and no assets in the state. More importantly, NWS has never sold cigarettes to consumers in Idaho.<sup>1</sup> As NWS never sold cigarettes to Idaho consumers, no contact existed with individuals in Idaho out of which the State's claims could arise. Indeed, selling goods F.O.B. Seneca Nation at NWS's office on the Seneca Nation of Indians Territory affirms that the transactions occurred exclusively outside of Idaho. Moreover, the title and risk of loss with respect to the cigarettes passed to the buyer at the time their purchases were consummated on the Seneca Nations of Indians Territory.

NWS never purposely interjected itself into Idaho's affairs. It has no relationship with Idaho. Instead, it would be forced to bear an unreasonable burden of defending in Idaho where it has no office, no employees and no legal or economic relationships. Moreover, this attempt to assert jurisdiction by Idaho conflicts with the sovereignty of the Indian Tribes involved, particularly the Sac and Fox Tribe, by which NWS is chartered, and the Seneca Tribe, of which Mr. Montour is a member and which licenses NWS to do business on its tribal land. Idaho's interest in this case is minimal as Idaho's action is merely one skirmish in the overall concerted litigation strategy of the National Association of State Attorneys General, which has conducted a war against NWS in a variety of forums throughout the country. This divide and conquer litigation strategy in which multiple states are attacking NWS in

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<sup>1</sup> If cigarettes that NWS sold to third parties were, in turn, sold to Idaho consumers, they were sold by, or at the direction of, independent third parties with NWS exercising neither direction nor control. See *Ashai Metal Indust. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (personal jurisdiction over a defendant cannot be predicated on the unilateral acts of independent third parties).

order to increase litigation costs for a single corporation should not be condoned by this Court. Similar issues are being litigated in several alternative forums, and it is not essential to litigate in Idaho.

**B. The Court does not have subject matter jurisdiction over this dispute. The Complementary Act does not apply to NWS.**

NWS, owned by a Native American and chartered by an Indian tribe, sells solely to entities located on tribal land and owned by Native Americans and is engaged in tribal-to-tribal transactions. Plaintiffs seek to enforce the Idaho Tobacco Master Settlement Agreement Act (“Idaho MSA Act”) or the Complementary Act, Idaho Code § 39-8401, upon these tribal-to-tribal transactions, which is beyond the scope of clear language of the statute.

In November 1998, Idaho entered into a Master Settlement Agreement with the largest United States cigarette manufacturers, thus concluding multi-state tobacco litigation in which Idaho was a party. Pursuant to the MSA, Idaho adopted uniform legislation requiring non-MSA signatories that sold cigarettes in any MSA state to either join the MSA or to fund a qualified escrow, Idaho Code § 39-7803(b), of the Idaho Tobacco Master Settlement Agreement. The Act required non-participating manufacturers to place into a qualified escrow fund a prescribed sum of money “per unit sold” in Idaho. Idaho Code § 39-7803(b)(1) “Units sold” is the number of individual cigarettes sold in Idaho by the tobacco product manufacturer during the year in question, “as measured by excise taxes collected by the state on packs ... bearing the excise tax stamp of the state ....” Idaho Code § 39-7802(j).<sup>2</sup> The excise tax is levied pursuant to the Cigarette and Tobacco Products Tax statute, Idaho Code § § 63-2501, *et seq.* The Act defines wholesaler as every person who “purchases, sells or distributes cigarettes to other wholesalers or to retailers for the purpose of resale.” Idaho Code § 63-2502(a). The statute requires Idaho cigarette stamps to be affixed to each individual package of cigarettes to evidence

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<sup>2</sup> “Units sold” in the Idaho Complementary Act has the same meaning as that term is defined in the MSA Act. Idaho Code § 39-8402(10).

payment of the excise tax. Idaho Code § 63-2507 provides that “no cigarettes may be purchased, sold, distributed, stored or held on hand or in possession of any person without Idaho stamps having been affixed thereto ....” Idaho Code § 63-2508. The unambiguous language of the statutes ties the calculation of the number of “units sold” to the imposition of the excise tax on the cigarettes sold. Thus, if no excise tax is assessed, no “units” are sold in Idaho for the purposes of the MSA statute and the Complementary Act.

Idaho does not collect excise taxes from cigarette sales on tribal land. Although Idaho generally is entitled to impose an excise tax on cigarettes sold within the state, the Doctrine of Sovereign Immunity prohibits Idaho from suing any Indian Tribe to compel collection of state sales and excise taxes on sales of cigarettes made in Indian Country. *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*. 498 U.S. 505, 514 (1991). “Indian Tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Id.* at 509. Thus, the Doctrine of Sovereign Immunity bars suits against Indian tribes. *Id.* Although an Indian tribe is sovereign immunity limits neither the state’s authority to tax sales of cigarettes to non-members of the tribe on tribal land or the tribe’s obligation to assist in the collection of a validly imposed tax, sovereign immunity denies the state a judicial avenue to compel a tribe to comply with these obligations. *Id.* at 512-13. The Supreme Court of the United States concluded that instead of suing the tribe, a state could enforce its tax laws by entering in agreements with tribes to “adopt a mutually satisfactory ‘solution’.” *Id.* at 514. However, the imposition of a tax on reservation sales of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians, was nothing less than a direct tax upon commerce with Indian tribes and, as such, was not permissible absent congressional consent. *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P.2d 187 (1973), cert. denied, 4419 U.S. 1089, 95 S.Ct. 679, 42 L.Ed.2d 681 (1973). The Court has also stated that when

Congress does not instruct otherwise, a state's excise taxes is unenforceable if its legal incidence falls on a tribe or its member for sales made within Indian Country. *Goodman Oil Co. of Lewiston v. Idaho State Tax Commission*, 136 Idaho 53, 28 P.3d 996 (2001), cert. denied, 534 U.S. 1129, 122 S.Ct. 1068, 151 L.2d, 971 (2001). As former Attorney General Larry Echohawk observed in his article "Balancing State Tribal Power to Tax in Indian Country," 40 Idaho L.Rev. 623, 648 (2004), *Goodman Oil* "demonstrates a continuing commitment to broad views of tribal sovereignty."

In light of this law, Idaho does not collect excise taxes from cigarette sales on tribal land. Accordingly, the MSA Act and Complementary Act, which apply only to "units sold," the calculation of which relies on the excise tax imposed, cannot by their express terms apply to cigarettes sold on tribal land on which no excise tax is levied.

Indeed, the State of Idaho by and through Attorney General Wasden asserted this exact point in its brief to this Court in support of its motion to enforce the Master Settlement Agreement against the tobacco company defendants. As seen in the relevant pages of its brief filed on April 25, 2006, in Case No. CV OC 97-03239D, attached hereto as Exhibit "A," and of which this Court may take judicial notice, the State stated: "In Idaho, no excise tax is collected on cigarettes sold in interstate commerce, on military reservations, by Indians on Indian reservations, so these sales are excluded from 'Units Sold'." Thus, the State of Idaho is judicially estopped from taking another position in the current litigation.

The Idaho MSA Act and the Complementary Act do not apply to cigarettes sold by NWS to tribal entities on tribal lands. Therefore, NWS cannot as a matter of law have violated the MSA Act or the Complementary Act and thus this Court has no jurisdiction over the subject matter of this Complaint. Since Plaintiffs have failed to state a claim upon which relief may be granted, this Complaint should be dismissed under Rule 12(b)(6), I.R.C.P.

C. **The Idaho MSA Act and/or Complementary Act impermissibly attempt to extend the jurisdiction the sales of cigarettes in Indian country to tribal members.**

Plaintiffs' Complaint omits several facts crucial to the issue whether Idaho's MSA Act is preempted by the Indian Commerce Clause as it relates to NWS transactions. NWS is an Indian-owned entity doing business with other Indian-owned entities only on tribal land. The law is clear that state jurisdiction over Indians in Indian country is extremely limited. State law applies in Indian Country only if Congress has expressly so provided. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). There does not appear to be any federal statute allowing Idaho to levy escrow payments on NWS.

"[I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (citing *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 175 (1977)). However, "when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); see also *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (concluding that the state was without authority to "tax reservation lands and reservation Indians"). Here, the state of Idaho is clearly attempting to regulate on-reservation conduct between Indians. Idaho's interest in regulating transactions between Indians on Indian land is minimal, especially in light of the low probability that reservation Indians will receive the State's resources that the MSA Act is designed to protect. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). Even if Idaho could reach on Indian land to regulate Indian-to-Indian transactions, the Plaintiffs seek to apply the Idaho MSA Act and the Complementary Act beyond the scope intended by the Idaho legislature.

The United States Supreme Court has determined that the Indian Commerce Clause preempts state

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taxes that sweep too broadly – by seeking to tax Indian activities both on and off Indian country. *See Colville*, 447 U.S. 134. Nothing in the MSA Act or the Complementary Act allows for application of the sales made on tribal land to tribal members. It is apparent that the Idaho legislature did not intend to reach onto tribal lands to regulate Indian-to-Indian transactions.

Plaintiffs also appear to assert a claim over NWS under the Idaho Cigarette Tax Law relating to Idaho “Wholesalers,” as defined in I.C. § 63-2502(a). The problems with that claim include the issues discussed above and also the fact that NWS cannot be intended to come within the scope of the Act as it sells only to Indian customers for delivery not in Idaho.

The Idaho Supreme Court in *Mahoney* made clear that such taxation and regulation of Indian sellers on Indian reservations was impermissible. Indeed, the Court made no distinction whether the purchaser was Indian or non-Indian. NWS sells to no non-Indians, sells only for on-reservation transactions, sells free on Board Indian Territory, and does not sell in Idaho.

To include NWS in the definition of “wholesaler” is not supported by the statute and violates the *Mahoney* holding. The Court there stated that a “tax or sales made by Indians on Indian reservations involves an assumption of power by a State which the Commerce Clause was meant to end.” 96 Idaho at 62, 524 P.2d at 190. The Court also noted that “it is elementary hornbook law that ‘the states may not tax property in transit in interstate commerce’.” *Id.* at 63, 524 P.2d at 191.

The suggestion that the Cigarette Tax Statute applies here also infringes on the right of reservation Indians to make their own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217, 220 (1959). Accordingly, the statute would be unconstitutional if construed to cover the NWS transactions with tribal entities for sale on Indian Country. “States carry the difficult burden of establishing specific, legitimate interests in on-reservation conduct in order to justify infringing on tribal self-government and economic development.” *Echohawk*, 40 Idaho L.Rev. at 646.



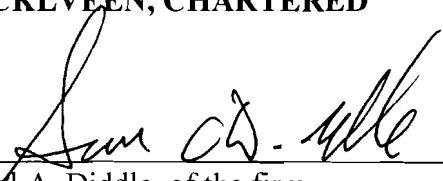
**III.**

**CONCLUSION**

NWS requests that this Court dismiss this matter as it has no personal jurisdiction over NWS. In the alternative, NWS seeks dismissal as the Court has no subject matter jurisdiction over any aspect of this Complaint. In addition, the Complaint fails to state a claim on which relief can be granted.

DATED this 6 day of May, 2009

**EBERLE, BERLIN, KADING, TURNBOW,  
& MCKLVEEN, CHARTERED**

By   
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 6 day of May, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

DAVID G. HIGH, ISB # 1820  
Chief, Civil Litigation Division

MICHAEL S. GILMORE, ISB #1625  
Deputy Attorney General  
Statehouse, Room 210  
Boise, ID 83720-0010  
Telephone: (208) 334-4130  
E-mail: mike.gilmore@ag.idaho.gov  
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Attorneys for Plaintiff State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney General,  
Plaintiff,

PHILIP MORRIS, INC.,  
R.J. REYNOLDS TOBACCO CO.,  
RJR NABISCO, INC.,  
AMERICAN TOBACCO CO., INC.,  
BROWN & WILLIAMSON TOBACCO CORP.,  
LIGGETT & MYERS, INC.,  
LORILLARD TOBACCO CO., INC.,  
UNITED STATES TOBACCO CO., INC.,  
B.A.T. INDUSTRIES, PLC,  
BRITISH AMERICAN TOBACCO CO., LTD.,  
THE COUNCIL FOR TOBACCO RESEARCH -  
U.S.A., INC., and  
TOBACCO INSTITUTE, INC., foreign  
corporations,

Defendants.

Case No. CV OC 97-03239D

BRIEF IN SUPPORT OF STATE'S  
MOTION:

(1) TO ENFORCE MASTER  
SETTLEMENT AGREEMENT,

(2) TO DECLARE THAT IDAHO HAS  
DILIGENTLY ENFORCED ITS QUALI-  
FYING STATUTE DURING 2003, AND

(3) TO DECLARE THAT IDAHO'S  
PAYMENTS UNDER THE MSA SHALL  
NOT BE REDUCED BY THE 2003 NPM  
ADJUSTMENT,

OR, IN THE ALTERNATIVE,

(4) TO DECLARE THAT SOME  
DEFENDANTS HAVE WAIVED OR  
SHOULD BE ESTOPPED FROM  
CERTAIN CLAIMS THAT IDAHO HAS  
NOT DILIGENTLY ENFORCED ITS  
QUALIFYING STATUTE

BRIEF IN SUPPORT OF MOTION: (1) TO ENFORCE MASTER SETTLEMENT AGREEMENT, ETC. - 1



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shall constitute a Qualifying Statute." MSA § IX(d)(2)(E), App., p. 14.

34. Exhibit T's Model Qualifying Statute provided that it "would be contrary to the policy of the State if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise." MSA, Ex. T, Qualifying Statute § [1](f),<sup>9</sup> App., p. 25. To prevent a cost advantage to the Non-Participating Manufacturers, the Qualifying Statute provides that Tobacco Product Manufacturers selling in the State must either join the MSA or escrow specific amounts based upon each "Unit Sold" in the State, id., Qualifying Statute §§ [3](a)-(b)(1), App., pp. 27-28, and the State must also provide penalties for Non-Participating Manufacturers who do not properly escrow required funds, id., Qualifying Statute § [3](b)(3), App., pp. 28-29.

35. The Model Qualifying Statute, as well as Idaho Code § 39-7802(j) of the Idaho MSA Act, defines "Units Sold" as "the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer . . . during the year in question, as measured by excise taxes collected by the State on packs (or 'roll-your-own' tobacco containers) bearing the excise tax stamp of the State." Id., § [2](j), p. 27. In Idaho, no excise tax is collected on cigarettes sold in interstate commerce, on military reservations, or by Indians on Indian reservations, so these sales are excluded from "Units Sold."<sup>10</sup>

#### **IV. Idaho Enacted a Qualifying Statute and a Complementary Act and Adopted Rules to Implement the Complementary Act**

36. Idaho enacted its Qualifying Statute in 1999. *Compare* 1999 Idaho Session Laws, chapter 7, enacting the Idaho Tobacco Master Settlement Agreement Act (Idaho MSA Act), Idaho Code §§ 39-7801 thru 39-7803, *with* the MSA Qualifying Statute, Ex. T, App., pp. 25-29.

37. During the course of enforcing Idaho's MSA Act in 2000-2001, it became clear

<sup>9</sup> The Model Qualifying Statute to the MSA did not number its sections. For convenience, bracketed section numbers are added whenever the Model Qualifying Statute's sections are discussed.

<sup>10</sup> Pursuant to state law, Idaho does not collect excise taxes on cigarette sales in interstate commerce, on military reservations in Idaho, or by Indians on Indian reservations in Idaho. See Idaho State Tax Commission Idaho Cigarette and Tobacco Product Tax Administrative Rules 13, 14, 18, and 22, IDAPA 35.01.10.013, -.014, -.018, and -.022.

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 4:50

MAY 06 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& MCKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542  
Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**AFFIDAVIT OF ARTHUR**  
**MONTOUR IN SUPPORT OF**  
**MOTION TO DISMISS FOR**  
**LACK OF PERSONAL**  
**JURISDICTION**

STATE OF FLORIDA )  
COUNTY OF Broward ) ss.:

ARTHUR MONTOUR, being duly sworn, deposes and says the following based on his  
personal information and belief:

1. I am the President and sole owner of Defendant, Native Wholesale Supply  
Company ("NWS"). I am a Native American and a member of the Seneca Nation. I am fully  
familiar with the facts set forth herein, and I submit this affidavit in support of NWS's motion to

**AFFIDAVIT OF ARTHUR MONTOUR IN SUPPORT OF**  
**MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION - 1**  
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dismiss the Complaint of Plaintiffs, State of Idaho by and through Lawrence G. Wasden, Attorney General, and the Idaho State Tax Commission.

2. In 2000, NWS was chartered as a corporation by the Sac and Fox Tribe of Oklahoma. I have been the President and sole owner of NWS since it was chartered. NWS' office has always been located on Seneca Nation of Indians Territory in northern New York. NWS does not have an office in Idaho.

3. The primary business of NWS is the sale of tobacco products. NWS imports cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. ("Grand River") for resale to third parties. Grand River is wholly owned by Native Americans who are members of the Six Nations that comprise Iroquois Confederacy. Grand River is a Canadian corporation that produces, packages and sells tobacco products. Grand River's facility is located on the Grand River Reserve in Oshweken, Ontario, Canada.

4. NWS purchases and imports cigarettes from Grand River that are shipped to their ultimate destinations on Indian territory in the United States via one of four facilities: (a) the Western New York Foreign Trade Zone in Lackawanna, New York; (b) the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; and (c) bonded warehouses on the Seneca Nation of Indians Territory. Prior to 2006, the foregoing list included a bonded warehouse in Oklahoma. NWS does not own any of these facilities.

5. As mentioned above, NWS resells the cigarettes only to tribes or entities in the United States that are located on tribal land and owned by Native Americans. Specifically, with respect to Idaho, cigarettes are sold only to a company that is located on trust land and owned by individuals who are enrolled members of federally recognized tribes. All orders are placed and processed at NWS' office on the Seneca Nation of Indians Territory. All checks or other forms

**AFFIDAVIT OF ARTHUR MONTGOMERY IN SUPPORT OF  
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION - 2**

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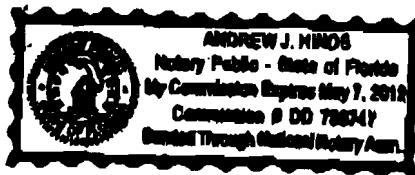
of payment are remitted or forwarded to NWS' office. All cigarettes sold by NWS are in packages that are stamped "for reservation sales only."

6. All cigarettes sold by NWS are (and have always been) sold at all times on an F.O.B. Seneca Nation of Indians Territory basis, with title and risk of loss deemed as transferring to the purchaser at the time of sale on the Seneca Nation of Indians Territory. Once a transaction is completed, products are shipped via one of the four aforementioned facilities. NWS does not exercise any control over its products subsequent to their sale to third parties. NWS does not sell or import any cigarettes into the State of Idaho. Any transport of products to Idaho occurs solely as a result of a third party's conduct or direction.

7. As stated above, NWS is a corporation chartered by the Sac and Fox Tribe, with its place of business on the Seneca Nation of Indians Territory in New York. NWS has no presence in Idaho, and does not do or transact business in Idaho. Specifically, NWS does not sell products within the jurisdiction of the State of Idaho, nor has it ever contracted to do so; NWS does not maintain any place of business in Idaho; NWS has no personnel, office, real estate, sales agents, mailing address or bank account in Idaho; NWS does not advertise or solicit business within the jurisdiction of the State of Idaho; NWS does not have a telephone number or listing in Idaho; and NWS does not own or have registered an automobile in Idaho.

  
ARTHUR MONTOUR

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of May, 2009.



Andrew Hinds  
Notary Public  
Residing: Broward County  
My Commission Expires: 5/7/12

AFFIDAVIT OF ARTHUR MONTOUR IN SUPPORT OF  
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION - 3

57032-1/00170334.000

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 6 day of May, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle



Samuel A. Diddle, ISB #4967  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney General;  
and the IDAHO STATE TAX COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY COMPANY,  
a corporation; and Does 1 through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S OBJECTION  
TO PLAINTIFFS' MOTION  
FOR AWARD OF  
ATTORNEYS FEES**

COMES NOW, Defendant Native Wholesale Supply Company, ("NWS"), by and through its attorney of record, Samuel A. Diddle of the law firm of Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and hereby submits this objection to Plaintiffs' Motion for Award of Attorneys Fees.

**I.**

28 U.S.C § 1447(c) provides that "remanding a case may require payment of actual expenses including attorneys fees incurred as a result of removal." The Supreme Court has held

that, “absent unusual circumstances, fees should not be awarded when the removing party has an objectively reasonable basis for removal.” *Martin v. Franklin Capital Corp.* 546 U.S. 132, 141, 126 S.Ct. 704 (2005). Defendant NWS is in the midst of defending a coordinated attack by an association of State Attorney Generals in several states, all attempting to apply state statutes to commercial transaction occurring solely on Indian country and involving only enrolled numbers of Native American Tribes or entities owned exclusively by enrolled members of Native American Tribes. Defendant’s belief that the case would necessarily implicate Federal law and confer Federal jurisdiction is objectively reasonable.

In other courts in which a removal issue has been addressed, no other Federal court has awarded attorneys fees against NWS. *See* Docket entries 8 and 9.

In addition to the impropriety of an award at all, the Plaintiff has failed to meet its burden to submit competent evidence to support an award of attorney’s fees. Attorneys fees/awards for State salaried attorneys must be based upon actual incurred expenses not prevailing market rates. *Wisconsin v. Hotline Industries*, 236 F.3d 363, 368 (7<sup>th</sup> Cir. 2000).

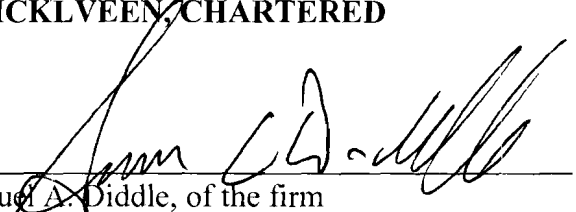
In *Hotline Industries*, the issue was whether 28 U.S.C. § 1447(c), the fee shifting provision applicable to improper removal proceedings, “permits salaried government employees to recover at prevailing market rates.” *Id.* at 364. The Court ruled that because the statute expressly limits recovery to “payment of just costs and any actual expenses, including attorney fees,” the district erred by awarding attorney’s fees based on prevailing market rates rather than the attorney’s fees that were actually incurred by the government in defending the removal action (i.e., a proportional share of the government attorney’s salary). *Id.* at 366-68.

Plaintiffs have submitted no affidavit outlining actual incurred expenses, but rather have recapitulated alleged time incurred moving for remand as applied to an alleged hourly rate for private practitioners. This is improper basis to support an award of fees and costs incurred by the

State utilizing salaried attorneys. Because the State has failed to sufficiently support a request for attorney's fees and costs, the motion should be denied.

DATED this 12 day of May, 2009.

**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

By   
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 12 day of May, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Fax

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
P.O. Box 36  
Boise, ID 83720-0410

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Fax

  
\_\_\_\_\_  
Samuel A. Diddle

**MAY 18 2009**

J. DAVID NAVARETTO, Clerk  
By L. AMES  
DEPUTY

**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL  
STATE OF IDAHO

**BRETT DELANGE, ISB #3628**

Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 West Jefferson, 2<sup>nd</sup> Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424  
Facsimile: (208) 334-4151  
[brett.delange@ag.idaho.gov](mailto:brett.delange@ag.idaho.gov)

**Attorneys for the State of Idaho**

**THEODORE V. SPANGLER, JR., ISB #1318**

Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844  
[tspangler@tax.idaho.gov](mailto:tspangler@tax.idaho.gov)

**Attorneys for the Idaho State Tax Commission**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**AMENDED NOTICE OF HEARING**

Please be advised that on the 2<sup>nd</sup> day of July, 2009, at 3:30 p.m., or as soon thereafter as counsel can be heard, the following motions will be heard before the Honorable Timothy L. Hansen, Ada County District Court Judge:

Plaintiffs The State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission, (collectively "the State"), will bring the State's Motion for Preliminary Injunction for hearing; and

Defendant Native Wholesale Supply Company, by and through its attorney, Samuel A. Diddle, will bring the Defendant's Motion to Dismiss for hearing.

DATED this 18<sup>th</sup> day of May, 2009.

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By



**BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division**

**IDAHO STATE TAX COMMISSION**

By



**THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission**

## CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of May, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile

  
\_\_\_\_\_  
BRETT T. DELANGE  
Deputy Attorney General

JUN 23 2009

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

THEODORE V. SPANGLER, JR., (ISB No. 1318)  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844

Attorneys for the Idaho State Tax Commission

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,

Defendant.

)  
)  
) Case No. CV OC 0815228  
)

) PLAINTIFFS STATE OF IDAHO AND  
) THE IDAHO STATE TAX  
) COMMISSION'S MEMORANDUM IN  
) OPPOSITION TO DEFENDANT'S  
) MOTION TO DISMISS ON PERSONAL  
) JURISDICTION GROUNDS  
)

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## INTRODUCTION

For the past five years, defendant Native Wholesale Supply Company (Native Wholesale), has sold, at wholesale, over 92,000,000 cigarettes to Warpath, Inc., an Idaho corporation located in Plummer, Idaho, which in turn sells these cigarettes to the public. The problem with this is that all of these cigarettes are contraband and all of their sales prohibited by law. Indeed, the facts of this case are that Native Wholesale has systematically violated Idaho's tobacco sales and cigarette tax laws and continues to do so today.

The cigarettes that Native Wholesale has sold are contraband, because neither the cigarette brands (Seneca and Opal) nor the manufacturer of them (Grand River Enterprises Six Nations Ltd. (Grand River)) have ever been approved for listing on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families, (Idaho Directory), established pursuant to Idaho Code Section 39-8403 of the Idaho Tobacco Master Settlement Agreement Complementary Act (Complementary Act).<sup>1</sup> The cigarette sales are also illegal because Native Wholesale is wholesaling these cigarettes to Warpath, Inc. without the cigarette permit required by Idaho Code Section 63-2503(1) of Idaho's cigarette tax laws.

Native Wholesale's response, in part, to its pervasive and multi-year illegal cigarette sales is to tell this Court that it may not exercise personal jurisdiction over it. Native Wholesale claims that it has no physical presence in Idaho and that title to its cigarette sales to Warpath, Inc., transfers in New York State. Its lack of physical, or brick-and-mortar, presence in Idaho does not mean, of course, that this Court lacks personal jurisdiction. Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992) (A foreign corporation that avails itself of "the benefits of an economic market in the forum state" is sufficient to establish personal jurisdiction "even if it has

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<sup>1</sup> The Complementary Act prohibits any "person" from selling, distributing, transporting, importing, or causing to be imported cigarettes that are not listed on the Idaho Directory or that the person "knows or has reason to know" will be sold, offered or possessed for sale in Idaho. Idaho Code § 39-8403(3).

no physical presence in the State.”) Further, where title transfers does not answer whether a Court may exercise personal jurisdiction over a business. The undisputed facts here establish that Native Wholesale has intended to profit and indeed has profited, by availing itself of the opportunity to market cigarettes in Idaho. This personal availment is sufficient for there to be personal jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).

The error in Native Wholesale’s claim of no personal jurisdiction is based upon the following incontrovertible legal principles:

◇ Idaho’s long-arm statute permits this Court to exercise personal jurisdiction over Native Wholesale to the full extent allowed by the Due Process Clause of the United States Constitution. Schwillling v. Horne, 105 Idaho 294, 298, 669 P.2d 183, 187 (1983).

◇ Due Process is satisfied, and personal jurisdiction may be exercised “over a non-resident defendant, when that defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Blimka v. My Web Wholesaler, LLC, 143 Idaho 723, 727, 152 P.3d 594, 598 (2007), *quoting* Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

◇ The type of “minimum contact” referred to is “whether the defendant ‘purposefully directed’ its activities at residents of the forum and whether the litigation results from the alleged injuries that arose out of or relate to those activities.” Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 80, 803 P.2d 978, 986 (1990), *quoting* Burger King, 471 U.S. at 472.

As spelled out below, the undisputed facts indicate that Native Wholesale voluntarily and purposefully directed its cigarette sales toward Idaho. Over a five-year time period, Native Wholesale sold, shipped, and caused to be imported over 92 million illegal cigarettes to Warpath,

Inc. Accordingly, Native Wholesale's motion to dismiss on personal jurisdiction grounds fails; there are multiple and myriad relevant contacts Native Wholesale has had with Idaho such that this Court may and ought to exercise personal jurisdiction over Native Wholesale.<sup>2</sup>

### **BACKGROUND**

Since at least January 1, 2004, Native Wholesale, a business located in New York, has acquired, held, owned, possessed, transported, imported, and/or caused to be imported for sale and distribution in Idaho two cigarette brands -- Seneca and Opal -- that are manufactured by Canadian-based tobacco manufacturer Grand River.<sup>3</sup> Native Wholesale's sales have totaled over 92 million cigarettes. None of the Seneca and Opal brand cigarettes Native Wholesale has sold has ever been listed on the Idaho Directory and approved for sale in Idaho.<sup>4</sup>

In May of 2008, the Attorney General obtained information indicating that Native Wholesale is selling Grand River's Seneca and Opal brand cigarettes to Idaho retailers. Accordingly, on June 5, 2008, the Attorney General notified Native Wholesale that its cigarette sales violated the Complementary Act.<sup>5</sup> In his letter, the Attorney General instructed Native Wholesale to cease its unlawful selling and shipping of Grand River cigarettes to Idaho retailers.<sup>6</sup>

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<sup>2</sup> Native Wholesale also has moved to dismiss on subject matter jurisdiction grounds. Pursuant to a motion, not contested to by Native Wholesale, the State is filing a separate brief to address these arguments.

<sup>3</sup> Second Affidavit of Beth Kittelmann (2nd Kittelmann Aff.) at pp. 2-3, ¶ 3.

<sup>4</sup> 2nd Kittelmann Aff. at p. 3, ¶ 4. Indeed, the Seneca and Opal cigarettes Native Wholesale has been selling are the subject of a court injunction proscribing their sale into Idaho. Specifically, on September 5, 2002, an Idaho district court issued an injunction (2002 injunction) against Grand River, prohibiting it from selling any cigarettes in Idaho "whether directly or through a distributor, retailer or similar intermediary or intermediaries." *See State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises*, CV OC 0205249M (4<sup>th</sup> Judicial District, Ada County). A copy of the 2002 injunction is attached to the 2nd Kittelmann Aff. as Exhibit A. The 2002 injunction was based on Grand River's violation of Idaho law related to tobacco sales. Grand River remains enjoined from selling cigarettes in Idaho and its cigarettes are not on the Idaho Directory. 2nd Kittelmann Aff. at p. 3, ¶ 6.

<sup>5</sup> 2nd Kittelmann Aff. at pp. 3-4, ¶ 7. A copy of this letter is attached to the 2nd Kittelmann Aff. as Exhibit B. The Attorney General also advised Native Wholesale that the manufacturer of the cigarettes at issue, Grand River, was the subject of the district court's 2002 injunction and that such cigarettes were not to be sold into Idaho. 2<sup>nd</sup> Kittelmann Aff. at p. 4, ¶ 8.

<sup>6</sup> 2nd Kittelmann Aff. at p. 4, ¶ 8.



Ignoring the Attorney General's June 5, 2008, letter, Native Wholesale continued to ship Seneca and Opal cigarette brands into Idaho. Specifically, on June 13, 2008, Native Wholesale sold, imported and/or caused to be imported into Idaho 1,460,000 Seneca and Opal brand cigarettes.<sup>7</sup> On July 21, 2008, Native Wholesale imported and/or caused to be imported into Idaho 1,634,000 Seneca and Opal brand cigarettes.<sup>8</sup> On August 21, 2008 (two days after it was served with the summons and complaint in this case), Native Wholesale imported and/or caused to be imported over 962,000 more cigarettes, at wholesale, to an Idaho retailer.<sup>9</sup> Native Wholesale has also had Idaho sales in 2009 to date totaling 2,508,000 cigarettes.<sup>10</sup>

In sum, Native Wholesale has sold, imported and caused to be imported into Idaho over 92 million Seneca and Opal brand cigarettes. These cigarettes have never been listed on the Idaho Directory, and Native Wholesale not only has violated but also continues to violate the Complementary Act. It also has never applied for nor possessed the cigarette wholesaler permit required by Idaho Code Section 63-2503.<sup>11</sup> The bottom line is this: Native Wholesale is engaging in a long-standing course of conduct in violation of Idaho tobacco sales and tax laws.<sup>12</sup>

### **ARGUMENT**

#### **I. LEGAL STANDARDS FOR REVIEWING A MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION ARE SETTLED**

To defeat Native Wholesale's motion to dismiss for lack of personal jurisdiction, the State "need only make a prima facie showing of jurisdictional facts." Nat'l Union Fire Ins. Co. v. Aerohawk Aviation, Inc., 259 F. Supp.2d 1096, 1101 (D. Idaho 2003). In reviewing such a

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<sup>7</sup> 2nd Kittelmann Aff. at p. 6, ¶ 16A.

<sup>8</sup> 2nd Kittelmann Aff. at p. 6, ¶ 16B.

<sup>9</sup> 2nd Kittelmann Aff. at p. 6, ¶ 16C.

<sup>10</sup> 2nd Kittelmann Aff. at p. 6, ¶ 16D.

<sup>11</sup> Affidavit of Don Anderson, p. 2, ¶¶ 4, 6. This affidavit was filed with the Court April 9, 2009.

<sup>12</sup> After being served with the summons and complaint in this case, Native Wholesale removed this case to federal court. The removal was improper and the federal court granted the State's motion to remand. The case is now properly back before the Court. During the time the matter was pending in federal court, Native Wholesale made additional illegal cigarette sales.

motion, the Court should construe all evidence presented in favor of the non-moving party and give that party “the benefit of all inferences which might be reasonably drawn.” Houghland Farms, 119 Idaho at 76, 803 P.2d at 980-81 (internal citation omitted). The State need not prove jurisdiction “by a preponderance of the evidence until trial or until the court holds an evidentiary hearing.” Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991).

## **II. JURISDICTIONAL FACTS SUPPORT THE EXERCISE OF PERSONAL JURISDICTION HERE**

There are a number of uncontroverted and controverted facts relating to Native Wholesale’s claim of no personal jurisdiction. The uncontroverted facts establish that this Court may exercise personal jurisdiction. The controverted thus are not material for present purposes.

### **A. It Is Uncontroverted That Native Wholesale Voluntarily And Purposefully Directed Its Activities Toward Idaho**

Native Wholesale purchases cigarettes from Grand River in Canada, imports the cigarettes into the United States, and stores them at one of three locations, one of which is the “Southern Nevada Foreign Trade Zone in Las Vegas, Nevada.” Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, (Montour Affidavit), p. 2, ¶¶ 3-5. After importing these cigarettes into the United States, Native Wholesale “resells” them to entities in the United States, and then ships the cigarettes “from one of the aforementioned [storage] facilities.” *Id.*, pp. 2-3, ¶¶ 4, 6. A significant number of these cigarette sales were to Idaho businesses. Indeed, over the past five years, Native Wholesale has sold over 92 million Grand River-manufactured Seneca and Opal cigarettes to Warpath, Inc. Verified Complaint, pp. 5, 7, ¶¶ 17-21, 28-30.

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**B. Native Wholesale's Statement Of Facts In Support Of Its Motion Are Controverted And Otherwise Immaterial**

Native Wholesale claims that all of its cigarette sales occur in New York. Mr. Arthur Montour, President of Native Wholesale, avers that all sales transactions between Idaho-based Warpath, Inc. and Native Wholesale take place solely on Seneca Nation territory in New York, stating that “[a]ll orders are placed and processed at Native Wholesale’s offices” in New York State; all payments are “remitted or forwarded to Native Wholesale’s office” in New York State; and Native Wholesale only sells its cigarettes “on an F.O.B. Seneca Nation basis, with title and risk of loss transferring to the purchaser at the time of sale on the Seneca Cattaraugus Indian Territory.” Montour Affidavit, pp. 2-3, ¶¶ 5-6. Finally, once Native Wholesale resells its cigarettes to third parties, Mr. Montour avers that “NWS does not exercise any control over its products subsequent to their sale to third parties” and “[a]ny transport of products to Idaho occurs solely as a result of third party’s conduct or direction.” *Id.*, p. 3, ¶ 6. These averments are not supported by relevant documentation of Native Wholesale’s sales to Idaho. Indeed, the facts establish the opposite.

**1. Native Wholesale Reaped Millions of Dollars in Sales to the Idaho Market**

In investigating this matter, the Attorney General served subpoenas and civil investigative demands upon the Nevada International Trade Corporation, also known as Foreign Trade Zone No. 89 (Nevada FTZ), the warehouse of Native Wholesale’s cigarettes, Con-Way Freight, a shipper of its cigarettes, and Warpath, Inc., the purchaser of Native Wholesale’s cigarettes. The business records produced as a result paint a very different story than that averred to by Mr. Montour.<sup>13</sup> Indeed, the records show that since January 2004, Native

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<sup>13</sup> True and correct copies of the subpoenas and civil investigative demands are attached to the 2nd Kittelmann Aff. As Exhibits C, D, and E. The documents are large in volume and the State has put them on a

Wholesale has sold, shipped, or caused to be shipped cigarettes to Warpath, Inc., on at least 51 different occasions.<sup>14</sup> Once Native Wholesale made a sale to Warpath, Inc., Native Wholesale directed the Nevada FTZ to load the cigarettes on a Con-Way Freight truck destined for Warpath, Inc.<sup>15</sup> Native Wholesale's shipments to Idaho have been sizable each year since 2004, with the total amount of cigarette sales per year as follows: **2004:** 24,650,000; **2005:** 21,406,000; **2006:** 22,830,000; **2007:** 24,442,000; **2008:** 15,000,000; **2009 to date:** 2,508,000.<sup>16</sup> The invoices for each of the shipments described above shows the total price Native Wholesale billed for that shipment.<sup>17</sup> Based only on the invoices obtained to date, Native Wholesale's gross income from Idaho sales totals more than \$4.4 million.<sup>18</sup>

## **2. Native Wholesale, and It Alone, Actively Directs the Transportation of These Cigarettes to Entities In Idaho**

Far from exercising no control over its cigarettes after their sale (assuming that Native Wholesale's characterization of the location of the "sale" as occurring exclusively in New York is accurate and relevant, which it is not), Native Wholesale is the exclusive director of their transportation to Idaho. As noted above, Native Wholesale's shipments to Warpath, Inc., proceed via the FTZ in Las Vegas Nevada. Native Wholesale is the entity that ships these cigarettes to the FTZ.<sup>19</sup> Native Wholesale provides the instructions and necessary documentation for the receipt and storage of these cigarettes by the FTZ, and pays for their

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CD-Rom, in pdf format, arranged in three files labeled "Nevada FTZ Records," "Con-Way Records," and Warpath Records." 2nd Kittelmann Aff. at pp. 4-5, ¶ 13.

<sup>14</sup> 2nd Kittelmann Aff. at p. 6, ¶ 15.

<sup>15</sup> 2nd Kittelmann Aff. at p. 4, ¶ 9.

<sup>16</sup> 2nd Kittelmann Aff. at p. 5, ¶ 14.

<sup>17</sup> 2nd Kittelmann Aff. at p. 6, ¶ 17.

<sup>18</sup> *Id.*

<sup>19</sup> Deposition of Jo Anne Tornberg (Tornberg Depo.) p. 47 L.23 – p. 49 L. 25. Ms. Tornberg's Deposition was taken on November 20, 2008 in Las Vegas Nevada. A complete certified copy of the transcript of Ms. Tornberg's deposition is attached to the 2nd Kittelmann Aff. As Exhibit G. The exhibits to the deposition have not been included due to their volume. They are available for filing should the Court wish to review them.

storage and handling.<sup>20</sup> Native Wholesale instructs the FTZ when to release cigarettes from storage, and what cigarettes to release from storage.<sup>21</sup> And – at least until August 2008 – Native Wholesale specifically instructed the FTZ to release them for transport to specified buyers in the buyers’ State, including naming the carrier to be used to transport the cigarettes to that State.<sup>22</sup> Native Wholesale, not Warpath, Inc., directs all releases from the FTZ to Idaho.<sup>23</sup>

### **3. Native Wholesale Has Assumed Further Control Over its Idaho Shipments Since August 2008**

In August 2008, Idaho informed the FTZ that the Native Wholesale cigarettes it was releasing for shipment to Idaho were contraband, and asked the FTZ to cease releasing such cigarettes for delivery to Idaho. The FTZ complied.<sup>24</sup> Following the FTZ’s decision, however, it was not Native Wholesale’s buyers who took control. Contrary to Mr. Montour’s affidavit that the “transport of product occurs solely as a result of a third party’s conduct or direction,” Montour Affidavit, p. 3, ¶ 6, Native Wholesale continued to control the shipments, with an even more hands-on approach. It still sent instructions to the FTZ to release specified quantities and kinds of cigarettes. But it now concealed from the FTZ the ultimate destination of these cigarettes, instructing the FTZ to release the cigarettes not to a common carrier for shipment to a final destination in Idaho, as was the case prior to August 2008, but instead back to Native Wholesale, which then made separate arrangements with carriers to pick up the shipments and forward them on to Warpath, Inc., without revealing to the FTZ their final destination.<sup>25</sup> To

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<sup>20</sup> Tornberg Depo. p. 22, Ll. 4 – 14; p. 74, L. 12 – p. 76, L. 7; p. 79, L. 16 – p. 81, L. 7.

<sup>21</sup> *Id.* p. 26, L.8 – p. 30, L. 4.

<sup>22</sup> *Id.* p. 26, L. 13 – p. 36, L. 4; p. 37, L. 3 – p. 38, L. 1; 2nd Kittelmann Aff., p. 4, ¶ 9.

<sup>23</sup> 2nd Kittelmann Aff., p. 4, ¶ 9. *See also* Tornberg Depo. p. 81, L. 8 – p. 82, L. 6; p. 34, L. 11 – p. 36, L. 4.

<sup>24</sup> 2nd Kittelmann Aff., p. 7, ¶ 19. A true and correct copy of the August 2008 letter is attached to the 2nd Kittelmann Aff. as Exhibit H. *See also* Tornberg Depo. p. 64, L. 16 – p. 65 L. 14.

<sup>25</sup> 2nd Kittelmann Aff., p. 7, ¶ 20. *See also* Tornberg Depo. p. 44, L. 5 – p. 49, L. 25.

further conceal the destination, Native Wholesale submitted invoices/bills of lading to the FTZ that show Native Wholesale as both the “buyer” and the seller.<sup>26</sup>

### **III. THIS COURT HAS STATUTORY AUTHORITY TO EXERCISE PERSONAL JURISDICTION OVER NATIVE WHOLESALE**

When “the state has expressed its interest in the subject matter of the suit,” jurisdiction may be exercised through a “special jurisdictional statute” to the limits allowed by due process. Beco Corp. v. Roberts & Sons Const. Co., 114 Idaho 704, 715, 760 P.2d 1120, 1131 (1988) *overruled on other grounds*, Houghland Farms, 119 Idaho at 81, 803 P.2d at 987. Here, there are three statutory bases authorizing this Court to exercise personal jurisdiction.

#### **A. Exercise Of Personal Jurisdiction By The Court Over Native Wholesale Is Authorized By The Complementary Act And Relevant Provisions of Title 63, Chapter 25, Idaho Code**

The Complementary Act contains an express legislative direction that Native Wholesale's cigarette sales to Idaho retailers, like Warpath, Inc., comply with its certification requirement. Idaho Code § 39-8403. The State alleges Native Wholesale has violated this requirement. Section 63-2503 further requires tobacco wholesalers like Native Wholesale to acquire a permit, which it has not. Sections 39-8404 and 63-2519, in turn, authorize this Court to exercise jurisdiction over Native Wholesale for these violations.

#### **B. Exercise Of Personal Jurisdiction By The Court Over Native Wholesale Is Authorized By Idaho's Long-Arm Statute**

Personal jurisdiction is also properly exercisable under Idaho's long-arm statute. Idaho's long-arm statute confers personal jurisdiction in this case under Idaho Code Sections 5-514(a), covering business transactions, and 5-514(b), covering tortious acts.

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<sup>26</sup> 2nd Kittelmann Aff., pp. 7, ¶ 20. True and correct copies of several representative samples of Native Wholesale's post-August 2008 invoices/bills of lading which show it both as the “buyer” and seller of its cigarettes are attached to the 2nd Kittelmann Aff. as Exhibit I. True and correct copies of several representative samples of Native Wholesale's pre-August 2008 invoices/bills of lading are attached the 2nd Kittelmann Aff as Exhibit J. *See also* Tornberg Depo. p. 45, L. 25 – p. 48, L. 8.

Idaho's long-arm statute is "designed to provide a forum for Idaho residents, is remedial legislation of the most fundamental nature and should be liberally construed." St. Alphonsus Reg'l Med. Ctr. v. State, 123 Idaho 739, 743, 852 P.2d 491, 495 (1993); *see also* Purco Fleet Servs., Inc. v. State Dep't of Fin., 140 Idaho 121, 124, 90 P.3d 346, 349 (2004). The law should be "interpreted as broadly as possible to extend jurisdiction to the maximum extent permitted by due process." Schwilling, 105 Idaho at 298, 669 P.2d at 187.

### **1. Native Wholesale Has Transacted Business in Idaho Under Section 5-514(a)**

Section 5-514(a) authorizes jurisdiction in cases involving "the transaction of any business within this state," defined as "the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation." Acts done either "in person or through an agent" are encompassed. *Id.* Section 5-514 was "designed to provide a forum for in-state residents in a world of increasingly complex commercial transactions" and should be interpreted broadly. S. Idaho Pipe & Steel v. Cal-Cut Pipe, 98 Idaho 495, 497, 567 P.2d 1246, 1248 (1977), *cert. denied*, 434 U.S. 1056 (1978).

A nonresident defendant may be subject to jurisdiction "by reason of doing business in the state" even though at no time "physically present therein." B.B.P. Ass'n v. Cessna Aircraft Co., 91 Idaho 259, 265, 420 P.2d 134, 140 (1966). Nor need the benefit realized by the defendant be direct: "[I]t is seldom that a manufacturer deals directly with consumers in other States . . . that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business." *Id.* A nonresident defendant's relationship with business entities that "were the agencies or instrumentalities by means of which [it] carried on the sales and servicing of its products in this state" constitutes "doing business in Idaho" even

if those entities “were independent contractors and not agents . . . in the ordinary sense of that term.” *Id.* at 263, 420 P.2d at 138. A manufacturer’s sale of its goods to another business it knows will distribute them “nationally, and specifically in Idaho” is purposeful availment of the benefits of conducting business within the state. Nat’l Union Fire Ins., 259 F. Supp.2d at 1106.

As noted above, the facts indicate that Native Wholesale sold, shipped and caused to be shipped into Idaho large volumes of cigarettes on an ongoing and continuous basis. Native Wholesale specifically directed its product to stores in Idaho and gained benefit and advantage from these sales. This constitutes conducting business in Idaho under Idaho’s long arm statute.

## **2. Native Wholesale Has Committed Tortious Acts in Idaho Under Section 5-514(b)**

Idaho’s long-arm statute also authorizes exercise of personal jurisdiction in cases involving “the commission of a tortious act within this state.” Idaho Code § 5-514(b). The conduct giving rise to the injury need not have taken place in Idaho. McAnally v. Bonjac, 137 Idaho 488, 50 P.3d 983 (2002) (personal jurisdiction found where field-burning by farmer in Washington caused respiratory injury in Idaho). “[A]n allegation that an injury has occurred in Idaho in a tortious manner is sufficient to invoke the tortious act language of Idaho Code § 5-514(b).” St. Alphonsus, 123 Idaho at 743, 852 P.2d at 495.

A tort, of course, is “the infringement of a right created otherwise than by contract.” Hanes v. Idaho Irr. Co., 21 Idaho 512, 122 P. 859, 861 (Idaho 1912). More recently, the Idaho Supreme Court has defined a tort simply as “the wrongful invasion of interest protected by law.” Just’s, Inc. v. Arrington Constr. Co., 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978). Torts can be common law torts and they can be statutory torts. Thus, Courts have held that violations of various laws constitute a tort. *See e.g.*, St. Alphonsus, 123 Idaho at 743, 852 P.2d at 495 (whether Washington’s exercise of legislative power to promulgate reimbursement rates is



classifiable as a tort is “a factual question and irrelevant to our examination of jurisdiction under the long-arm statute”); Daniel v. Am. Bd. of Emergency Med., 802 F.Supp. 912, 919 (W.D.N.Y. 1992) (“An action alleging violations of antitrust laws is a claim for injuries sustained, and therefore is in the nature of tort and state long-arm jurisdiction would apply.”); U. S. Dental Inst. v. Am. Ass’n of Orthodontists, 396 F.Supp. 565, 571 (N.D.Ill.1975) (alleged “unlawful restraint of trade” constitutes a tortious act).

Concerning a claim sounding in tort, there is no need for the defendant to directly do business in Idaho. Nat’l Union Fire Insur., 259 F. Supp.2d at 1102 (personal jurisdiction under Idaho long-arm statute is proper in claim against Pennsylvania manufacturer of airplane component parts distributed to Kansas plane manufacturer, when plane crash occurred in Idaho); Duigan v. A.H. Robins Co., 98 Idaho 134, 559 P.2d 750 (1977) (finding personal jurisdiction over Virginia manufacturer after plaintiff developed infection in Idaho from intrauterine device inserted in California); Doggett v. Elect. Corp. of Am., 93 Idaho 26, 454 P.2d 63 (1969) (jurisdiction over out-of-state component manufacturer found when industrial boiler assembled out-of-state exploded injuring Idaho man).

Again, as noted above, the facts indicate that Native Wholesale sold, shipped, and caused to be shipped, without a wholesale permit, cigarettes to Idaho businesses. The cigarette sales violate the Complementary Act and Idaho’s tax laws, and their introduction into Idaho means the injury from Native Wholesale’s conduct occurred in Idaho. This is enough to constitute the commission of tortious acts under Idaho’s long arm statute. As such, Native Wholesale’s illegal conduct falls under the State’s tort provision.

#### **IV. THIS COURT MAY CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER NATIVE WHOLESALE**

##### **A. Introduction**

Finding a statutory basis for personal jurisdiction, this Court must next determine whether the exercise of personal jurisdiction thus comports with Due Process. Based on the facts of this case, the Court may properly exercise personal jurisdiction over Native Wholesale.

There is irony in what Native Wholesale seeks to do here. It wants to enjoy all the benefits of doing business in the global markets of the twenty-first century while still being subject to the jurisdictional laws of the nineteenth century. This is contrary to justice, to public policy, and to the directive by the United States Supreme Court that due process analysis expand to meet the challenges of new technological advances. Hanson v. Denckla, 357 U.S. 235, 250-51 (1958). If due process stands for anything, it stands for the proposition that “a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings,” or, as in this case, by blatantly illegal dealings. Vencedor Mfg. Co., Inc. v. Gougler Indust., Inc., 557 F.2d 886, 891 (1st Cir. 1977) (Breyer, J.).

##### **B. Legal Standards For Determining Whether The Exercise Of Personal Jurisdiction Conforms With Due Process**

Constitutional due process analysis of jurisdiction has two prongs. First, the court must determine whether the defendant has minimum contacts—purposefully availed itself—with the forum state. Second, the court must decide whether exercise of jurisdiction is supported by traditional notions of fair play and substantial justice. Houghland Farms, 119 Idaho at 76, 803 P.2d at 982.

The United States Supreme Court has described the first prong of due process analysis as a “fair warning” standard. Burger King, 471 U.S. at 472. Due process is satisfied where the

defendant should be able to “reasonably anticipate being haled into court” in the forum state. Schneider v. Sverdsten Logging Co., 104 Idaho 210, 213, 657 P.2d 1078, 1081 (1983), *citing* World-Wide Volkswagen, 444 U.S. at 295. This requirement is met where the defendant “purposefully directed” activities toward the forum state or intends to derive benefits from its markets. Burger King, 471 U.S. at 473; Asahi Metal Indus. Co. Ltd. v. Superior Court, 480 U.S. 102, 112 (1987). Jurisdictional analysis is not susceptible to a mechanical test, but should be determined based upon the “quality and nature of the activity in relation to the fair and orderly administration of laws.” Int’l Shoe, 326 U.S. at 319.

Due process is not intended to act as a “territorial shield” whereby defendants can escape jurisdiction through artful structuring of commercial relations. Burger King, 471 U.S. at 473-74. “[W]here individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities.” *Id.*, at 473-74 (emphasis added; citations omitted). That a foreign corporation avails itself of “the benefits of an economic market in the forum State” is sufficient to establish personal jurisdiction “even if it has no physical presence in the State.” Quill Corp., 504 U.S. at 307.

Personal jurisdiction was explored in the United States Supreme Court’s plurality opinion in Asahi. In that case, arising from a fatal motorcycle accident in California, a much-divided Court declined to permit jurisdiction over Asahi, a Japanese tire valve manufacturer. Asahi did no business in the United States, directly or through distributors, but sold tire valves to a Taiwanese tire manufacturer that incorporated them into tires sold to Honda, which in turn incorporated them into motorcycles that it sold in California.

Four Justices in Asahi, led by Justice Brennan, endorsed a “pure” stream of commerce theory of jurisdiction, finding the first prong of due process analysis—minimum contacts—satisfied when a foreign corporation places its product in the stream of commerce and it is foreseeable that it will be swept into the forum state. They found that it was foreseeable that Asahi’s products would arrive in California, but declined to exercise jurisdiction on fairness grounds. Asahi, 480 U.S. at 16-21. Four other Justices, led by Justice O’Connor writing for the Court, endorsed a “stream of commerce plus” theory: For jurisdiction to attach, a foreign corporation must, in addition to placing its product in the stream of commerce, engage in “additional conduct . . . indicating[] an intent or purpose to serve the market in the forum State.” *Id.*, at 112. The ninth Justice, Justice Stevens, joined by two other Justices, found the “volume, the value, and the hazardous character of the components” in Asahi significant enough to evince purposeful availment, but thought that exercise of jurisdiction would be “unreasonable and unfair.” *Id.*, at 121.

Post-Asahi, some jurisdictions have continued to use a pure stream of commerce theory, while others have adopted the stream of commerce plus theory; yet others have not taken a definitive position. *See, e.g., Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993) (discussing adoption of different positions). Two leading pre-Asahi Idaho cases, Duigan, 98 Idaho 134, 559 P.2d 750 (1977), and Doggett, 93 Idaho 26, 454 P.2d 63 (1969), in which personal jurisdiction was found over out-of-state manufacturers whose nationally marketed products led to injury in Idaho, can be read as supporting either a pure stream of commerce theory, or, alternately, a stream of commerce plus theory.

In this case, jurisdiction over Native Wholesale is supported under either theory, and is also valid under Justice Stevens’ position, given the substantial volume and value of the

cigarettes Native Wholesale is selling, shipping and causing to be shipped into Idaho, and the hazardous nature of Native Wholesale's products.<sup>27</sup>

**C. Native Wholesale Is Subject To Personal Jurisdiction Under A Pure Stream Of Commerce Theory**

Under the pure stream of commerce theory, "placement of a product into the stream of commerce" where it is foreseeable it will arrive in the forum state, alone, and absent any "showing of additional conduct," satisfies due process. Asahi, 480 U.S. at 117. Jurisdiction in this case is clearly valid under this test: Native Wholesale regularly placed its cigarettes in the stream of commerce, knowing and intending that they would end up in Idaho, where the injury in question occurred. Thus, this Court may properly exercise personal jurisdiction over it.

**D. Native Wholesale Also Is Subject To Personal Jurisdiction Under A Stream Of Commerce Plus Theory**

Jurisdiction over Native Wholesale is also supported under a stream of commerce plus theory, which requires, in addition to injection of a product into the stream of commerce, an intent or purpose to serve the forum state's market. The evidence is that Native Wholesale placed its cigarettes in the stream of commerce with the intent to serve an Idaho market. The presence of Native Wholesale's cigarettes in Idaho was "not simply an isolated occurrence," but arose from its intentional efforts "to service, directly or indirectly, the market for its product in [Idaho]." World-Wide Volkswagen, 444 U.S. at 297. Injury in Idaho occurred not because customers unilaterally brought individual products marketed locally in another part of the country to Idaho, but rather as the result of Native Wholesales' regular selling, shipping, and causing to be imported large quantities of their cigarettes directly to locations in Idaho. In

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<sup>27</sup> Personal jurisdiction over Native Wholesale is also supported under the effects test announced in Calder v. Jones, 465 U.S. 783 (1984), where the Supreme Court held that in the context of intentional torts, the purposeful availment requirement is met when a defendant purposefully direct foreign acts having an effect felt in the forum state. There is no doubt that Native Wholesale purposefully directed its illegal cigarettes to Idaho.

contrast to Asahi, Native Wholesale here “controls” the distribution system that brought the illegal cigarettes to Idaho. Asahi, 480 U.S. at 112-13. This satisfies the stream of commerce plus theory for personal jurisdiction.

**E. Native Wholesale Engaged In A Regular Course Of Dealing That Brought A Significant Volume Of Cigarettes Into Idaho**

In Asahi, Justice Stevens, joined by two other justices, held that a “regular course of dealing that results in deliveries” of a significant volume of product to the forum state “over a period of several years . . . constitute[s] ‘purposeful availment’ even though the item delivered to the forum State was a standard product marketed throughout the world.” Asahi, 480 U.S. at 112. Given the facts of Asahi, it is obvious that Justice Stevens’ approach would not require that the manufacturer directly deliver the product to the forum state for purposeful availment to exist, although that is what we have here: Native Wholesale directly delivers its illegal cigarettes to the Idaho market.

In addition to looking at the volume of Native Wholesale’s cigarettes reaching Idaho and its value (92 million cigarettes with value in excess of \$4.4 million), Justice Stevens, in imputing purposeful availment, would consider whether the product in question was “hazardous.” Asahi, 480 U.S. at 122. There are few products more hazardous than cigarettes. So, for example, in 1999, the Idaho Legislature found that smoking presents serious public health concerns to Idaho and its citizens. *See* Idaho Code § 39-7801(a). Noting that the Surgeon General also determined that smoking causes lung cancer, heart disease, and other serious diseases, the Legislature found that smoking also poses serious financial concerns for Idaho. *See id.* § 39-7801(a) - (b). In sum, the volume, value, and hazard of Native Wholesale’s product reaching Idaho support jurisdiction in this case under Justice Stevens’ test of purposeful availment.

**F. Traditional Notions Of Fair Play And Substantial Justice Support Jurisdiction Over Native Wholesale**

Concluding that Native Wholesale has purposefully availed itself of the benefits of the Idaho market, the Court should then “determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” Burger King, 471 U.S. at 477 (citation omitted). These factors include 1) “the burden on the defendant”; 2) “the forum State’s interest in adjudicating the dispute”; 3) “the plaintiff’s interest in obtaining convenient and effective relief”; 4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and 5) “the shared interest of the several States in furthering fundamental substantive social policies.” *Id.*, citing World-Wide Volkswagen, 444 U.S. at 292. These factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.” *Id.* Applying these factors here strengthens the State’s case for personal jurisdiction.

First, it is reasonable for Native Wholesale to defend this litigation in Idaho. Modern transportation and communications have made it much less burdensome for a party to defend itself in a State where he derives economic benefits, and it usually will not be unfair to subject him to the burdens of litigating in another forum. Burger King, 471 U.S. at 474. Indeed, “it may well be unfair to allow [an out-of-state defendant] to escape having to account in other States for consequences that arise proximately from such [interstate] activities.” *Id.*

Second, Idaho (the Plaintiff and the forum State in this action), has a strong interest in adjudicating this dispute in Idaho on behalf of its citizens in a local forum. “A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” *Id.* Denying personal jurisdiction here defeats that interest and would preclude the State from seeking relief provided for by the Act.

Third, the State has a great interest, too, in furthering important substantive social policies—the protection of the public health and the effective regulation of tobacco. The Legislature has thus emphasized that the Complementary Act’s provisions will “safeguard . . . the fiscal soundness of the state and the public health.” Idaho Code § 39-8401. And it cannot be gainsaid but that Idaho has an interest in the effective administration of its tax laws.

Where the Plaintiff has made a prima facie showing of purposeful availment, the burden shifts to the Defendant to make a “compelling case” that jurisdiction would be unreasonable. Burger King, 471 U.S. at 477. Native Wholesale has done nothing more than simply to contend, without substantiation, that it would “offend traditional notions of fair play and substantial justice to subject NWS to Idaho jurisdiction.” Native Wholesale Memo., p. 6. Such a statement does not meet this burden. If there is something unfair or that would offend justice and fair play in this case, it would be if the State of Idaho could not hold Native Wholesale accountable for its sales of over 92 million cigarettes, all of them contraband and illegal.

#### **V. NATIVE WHOLESALE’S ARGUMENTS ARE NOT PERSUASIVE**

Native Wholesale makes several arguments for why this Court may not exercise personal jurisdiction. It begins with the denial of any connection to Idaho because its cigarettes are sold “F.O.B Seneca Nation” with title to the product thus transferring in New York. Native Wholesale Memo., p. 7. This is error.

Title cannot pass in New York (or the Seneca Nation for that matter) because the cigarettes were not physically there. Under Idaho Code § 28-2-401, a seller and buyer can by contract provide for the time and place of title passing, but only subject to the provisions of the section. One of the provisions is that in no case can title pass prior to the identification of specific goods to the specific contract. Idaho Code § 28-2-401(1). Under Section 28-2-501(1)(a)



and (b), goods are identified when the contract is made if it is for goods already existing and identified, or if for the sale of future goods, then when the goods are shipped, marked or otherwise designated. In either event, the cigarettes in question are in Nevada, not New York. This means that the contract provisions providing for passage of title on the Seneca Reservation cannot be valid. That leaves the default rule of Section 28-2-401(2) for when title passes. It provides that title passes at the time the seller completes performance with reference to the physical delivery of the goods. If the contract requires delivery to a destination, title passes there. Idaho Code § 28-2-401(2)(b). Since the bills of lading show Native Wholesale selling and transporting the cigarettes to Warpath, Inc., by operation of law, title to these cigarettes passes in Idaho. *See Old West Realty, Inc. v. Idaho State Tax Commission*, 110 Idaho 546, 548, 716 P.2d 1318, 1320 (1989).

In any event, regardless of where title to the cigarettes passes, it make no difference for personal jurisdiction purposes. Native Wholesale admits that before it sells the cigarettes to Idaho businesses, it ships them to the FTZ in Nevada, and then after the cigarettes are sold to Idaho purchasers, they are shipped from Nevada to Idaho. And what also cannot be denied is that Native Wholesale controls the shipping of its cigarettes to Idaho. *See, supra*, pp. 8-10. It is Native Wholesale, not Warpath, Inc., that notifies the FTZ when a sale has occurred and that certain brand and styles of cigarettes in certain quantities should be readied and released for shipment to Warpath.<sup>28</sup> The trucking companies' bills of lading list Native Wholesaler as the shipper and as the entity to be billed.<sup>29</sup> Not one shipment in its five-plus years of cigarette sales to Idaho reflect any contact between Warpath and the Nevada FTZ or between Warpath and a

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<sup>28</sup> 2nd Kittelmann Aff., pp. 4, 7, ¶¶ 9, 20.

<sup>29</sup> 2nd Kittelmann Aff., p. 7, ¶ 20. True and correct copies of several representative samples of Native Wholesale's post-August 2008 invoices/bills of lading which show it both as the "buyer" and seller of its cigarettes are attached to the 2nd Kittelmann Aff. as Exhibit I.

trucking company, other than being listed as the purchaser and ultimate recipient of the cigarettes. In short, Native Wholesale directs all aspects of the storage and shipment of its cigarette sales into Idaho.

Native Wholesale cites to no authority for the proposition that where title passes controls a personal jurisdiction minimum contacts analysis and, in fact, case law rejects such a suggestion. As one federal court has stated, “[t]he fact that a manufacturer sells his product FOB a foreign country does not control for purposes of jurisdiction. See Taubler v. Giraud, 655 F.2d 991, 995 (9<sup>th</sup> Cir. 1981).” Meyers v. ASICS Corp., 711 F.Supp. 1001, 1005 n. 3 (C.D. Cal. 1989). Other courts are in accord. See Benitez-Allende v. Alcan Aluminio do Brasil, 857 F.2d 26, 30 (1<sup>st</sup> Cir. 1988) *cert. denied* 489 U.S. 1018 (1989) (“The fact that title to the cookers passed in Brazil is beside the point, for ‘[i]f *International Shoe* stands for anything, however, it is that a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings.’”) (citation omitted); As You Sow v. Crawford Labs., Inc., 58 Cal.Rptr. 2d 654, 658 (Ct.App. 1996) (“When legal title actually passe[s] is not the critical inquiry for a minimum contacts analysis”). Native Wholesale “may not shield itself from suit by a careful but formalistic structuring of its business dealings.” Vencedor Mfg. Co., 557 F.2d at 891.

Native Wholesale next argues that because it does not have an office or own a car or real estate in Idaho, this Court may not exercise “general jurisdiction.” Native Wholesale Memo., p. 6. This is a red herring. A court may exercise personal jurisdiction on one of two personal jurisdictional grounds: general or specific jurisdiction. It may exercise general jurisdiction over a nonresident defendant, even if defendant’s conduct which forms the basis for the claims being made in the lawsuit are not to defendant’s contacts with the forum, if the defendant has other unrelated contacts with the forum state that are sufficiently “continuous and systematic” that the

exercise of jurisdiction is “reasonable and just.” Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984), (internal citations omitted). Specific jurisdiction, on the other hand, may be exercised where the person has “purposefully directed” its activities toward the forum jurisdiction and where the underlying action is based upon activities that arise out of or relate to the person’s contacts with the forum. Burger King, 471 U.S. at 472; Houghland Farms, Inc., 119 Idaho at 76, 803 P.2d at 982. In this case the focus is on specific jurisdiction, not general jurisdiction, and so Native Wholesale’s denial of general jurisdiction adds nothing. *See Quill Corp.*, 504 U.S. at 307 (Foreign corporation that avails itself of “the benefits of an economic market in the forum State” is sufficient to establish personal jurisdiction “even if it has no physical presence in the State.”)

Finally, Native Wholesale asserts that the assertion of personal jurisdiction here “conflicts with the sovereignty of the Indian Tribes involved, particularly the Sac and Fox Tribe, by which NWS is chartered, and the Seneca Tribe, of which Mr. Montour is a member and which licenses NWS to do business on its tribal land.” Native Wholesale Memo., p. 7. Native Wholesale provides no legal support to support its argument and none exists.

There is nothing in the Indian Law to support the argument that being chartered by an out-of-state Indian Tribe means that a court in another forum may not exercise personal jurisdiction over that chartered business. Instead the very opposite is true: “Activity of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states.” Dep’t of Health and Human Servs. v. Maybee, 965 A.2d 55, 57-58 (Me. 2009), *citing Nevada v. Hicks*, 533 U.S. 353, 362-66 (2001),<sup>30</sup> as holding that, in the absence of federal legislation to the contrary, the state has the authority to execute a search warrant on a

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<sup>30</sup> The Hicks court, 533 U.S. at 362, made clear that States can regulate off-reservation conduct of tribal members: “When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.”

reservation against a tribal member suspected of violating state law outside the reservation.<sup>31</sup>

Idaho – like all States – has various regulatory jurisdiction over conduct on a reservation in many instances. Although states’ regulatory jurisdiction over conduct that is solely between members of a given tribe on their reservation is quite limited, when non-members are involved (such as Native Wholesale, which is not a member of the Coeur d’Alene Tribe, or for that matter, any tribe), or when on-reservation conduct has off-reservation effects, state law can and does apply. *See, e.g., New Mexico v. Mescalero Apache Tribe* 462 U.S. 324 (1983) (“A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention”). In *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 464-465 (1976), the Supreme Court held that to the extent on-reservation “smoke shops” sell cigarettes to non-Indians and non-member Indians, a state law applied to require the Indian proprietor to add the tax to the sales price and aid the State’s collection and enforcement of the tax. Similarly, in *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), the Court found that a state has regulatory jurisdiction to require tribal businesses to collect excise tax on cigarettes sold to non-members.

Here, Native Wholesale’s cigarettes sales, while to an outlet on the Coeur d’Alene Reservation, obviously have off reservation effects. The 92 million plus cigarettes sold to Warpath, Inc., constitute a staggering volume for a single retailer and plainly serve a market far larger than the on-reservation members of the Coeur d’Alene Tribe. According to the 2000

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<sup>31</sup> In the *Maybee* case, the Maine Supreme Court enforced that state’s retail tobacco vendor license requirements against a tribal member and online retailer located on a New York reservation. It reached this conclusion, in part, because the online tobacco retailer’s “interactions with consumers in Maine extend beyond the boundaries of the reservation.” 965 A.2d at 57.

Census, there are just over 1,325 American Indians living on the Coeur d'Alene Reservation.<sup>32</sup> The shipment of 92 million plus cigarettes to that reservation by Native Wholesale defies any suggestion that such a volume of cigarettes would be purchased exclusively by 1,325 consumers and Native Wholesale does not contend to the contrary. Clearly, large volumes of the cigarettes being sold to Warpath ultimately are being purchased by non-members of the Coeur d'Alene Tribe, resulting in large off-reservation effects. Native Wholesale knows or should know that these cigarettes are being sold and distributed to individuals other than Coeur d'Alene members.

Furthermore, being on an Indian reservation is not like being in a foreign country or even in a sister state. If you are on a reservation in Idaho you are in Idaho. *E.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188 (1989) ("In this case, . . . all of Cotton's leases are located entirely within the borders of the State of New Mexico and also within the borders of the Jicarilla Apache Reservation.") Second, Warpath, Inc. sells cigarettes to any willing buyer – Indian or non-Indian; tribal member or not.<sup>33</sup> Warpath is merely a retail outlet selling to the general public and thus subject to state jurisdiction. *See Moe*, 425 U.S. at 464-65. Third, Warpath, although situated on an Indian reservation, is not a “tribal entity” in any sense. Rather, as an Idaho-incorporated business, it is an Idaho resident. Caremark Therapeutic Servs. v. Leavitt, 405 F. Supp.2d 454, 458 (S.D.N.Y. 2006). Moreover, a corporation, even one owned by members of the tribe on whose reservation it sits, is not a tribal member or Indian itself. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003) (corporations have identities separate from that of their owners); Baraga Prods., Inc. v. Comm’r, 971 F. Supp. 294, 296 (W.D. Mich. 1977) *aff’d* 136 F.3d (6<sup>th</sup> Cir. 1998) (incorporated business entity not an enrolled member of an

<sup>32</sup> U.S. Census Bureau; Census 2000 Summary File 1 (SF1) 100-Percent Data, P9 Race; generated using American FactFinder; <http://factfinder.census.gov> (Aug. 11, 2008). This number, importantly, includes all persons self-identifying as American Indians and not just persons who are actual members of the Coeur d'Alene Tribe.

<sup>33</sup> Affidavit of Mark Ausman, pp. 1-2, ¶¶ 2-5.

Indian tribe simply because its sole shareholder is); *id.*, at 298 (“a corporation is not an ‘Indian’ for purposes of immunity” from the application of state law).

In sum, neither Native Wholesale’s charter with the Sac and Fox Tribe nor Mr. Montour’s membership in the Seneca Nation insulates his company from suit in Idaho on personal jurisdiction grounds. Courts regularly find jurisdiction over a foreign defendant where the defendant’s product arrived through the stream of commerce in the forum state via an equally foreign middleman. *See, e.g., A. Uberti & C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995), *cert. denied* 516 U.S. 906 (Italian manufacturer whose guns were sold in Arizona through third party middleman in Massachusetts); *Duple Motor Bodies Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) (sale of product by foreign manufacturer via middleman in England to buyers in Hawaii).

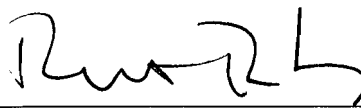
### **CONCLUSION**


Based on the foregoing argument, the State and the Tax Commission respectfully request that this Court deny Native Wholesale’s motion to dismiss on personal jurisdiction grounds.

DATED this 23<sup>rd</sup> day of June, 2009

**LAWRENCE G. WASDEN**  
**IDAHO ATTORNEY GENERAL**

**IDAHO STATE TAX COMMISSION**

By   
**BRETT T. DELANGE**  
**Deputy Attorney General**  
**Consumer Protection Division**

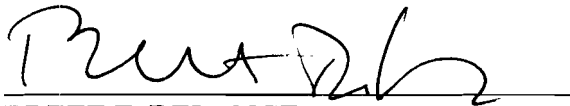
By   
**THEODORE V. SPANGLER, JR**  
**Deputy Attorney General**  
**State Tax Commission**

## CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of June, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



BRETT T. DELANGE  
Deputy Attorney General

NO. \_\_\_\_\_ FILED 438  
AM. \_\_\_\_\_  
JUN 23 2009  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

THEODORE V. SPANGLER, JR., ISB #1318  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844

Attorneys for the Idaho State Tax Commission

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through )  
LAWRENCE G. WASDEN, Attorney )  
General, and the IDAHO STATE TAX )  
COMMISSION, )  
Plaintiffs, )  
vs. )  
NATIVE WHOLESALE SUPPLY )  
COMPANY, a corporation, and Does 1 )  
through 20, )  
Defendant. )

Case No. CV OC 0815228  
PLAINTIFFS STATE OF IDAHO AND  
THE IDAHO STATE TAX  
COMMISSION'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS ON SUBJECT  
MATTER JURISDICTION GROUNDS



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## INTRODUCTION

For the past five years, defendant Native Wholesale Supply Company (Native Wholesale), has sold, at wholesale, over 92,000,000 cigarettes to Warpath, Inc., an Idaho corporation located in Plummer, Idaho, which in turn sells these cigarettes to the public. The problem with this is that all of these cigarettes are contraband and all of their sales prohibited by law. Indeed, the facts of this case are that Native Wholesale has systematically violated Idaho's tobacco sales and cigarette tax laws and continues to do so today.

The cigarettes that Native Wholesale has sold are contraband, because neither the cigarette brands (Seneca and Opal) nor the manufacturer of them (Grand River Enterprises Six Nations Ltd. (Grand River)) have ever been approved for listing on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho Directory) established pursuant to Idaho Code Section 39-8403 of the Idaho Tobacco Master Settlement Agreement Complementary Act (Complementary Act).<sup>1</sup> The cigarette sales are also illegal because Native Wholesale is wholesaling these cigarettes to Warpath, Inc. without the cigarette permit required by Idaho Code Section 63-2503(1) of Idaho's cigarette tax laws.

Native Wholesale's response, in part, to its pervasive and multi-year illegal cigarette sales is to tell this Court that it may not exercise subject matter jurisdiction over it.<sup>2</sup> Native Wholesale claims that Idaho law does not apply to it and that its status as a business chartered by an out-of-

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<sup>1</sup> The Complementary Act prohibits any "person" from selling, distributing, transporting, importing, or causing to be imported cigarettes that are not listed on the Idaho Directory or that the person "knows or has reason to know" will be sold, offered or possessed for sale in Idaho. Idaho Code § 39-8403(3).

<sup>2</sup> Native Wholesale also has moved to dismiss the present complaint on personal jurisdiction grounds. Pursuant to a motion, not contested to by Native Wholesale, the State of Idaho and the Tax Commission (collectively "the State"), are filing a separate brief to address these arguments. In order to conserve space, the State adopts and incorporates here the facts and background set forth in its personal jurisdiction brief.

state Indian Tribe and owned by an American Indian means that Idaho law cannot reach its illegal conduct.

Native Wholesale's motion to dismiss the present Complaint on subject matter jurisdiction grounds should be denied. Its arguments are not supported by the law. Specifically, Native Wholesale's motion fails because (a) the Complementary Act and Idaho's cigarette tax laws do apply to its sales activities; and (b) its Indian law arguments are not well taken. In short, the law does not allow Native Wholesale's tobacco business practices, as they affect Idaho's consumers, to continue to operate in violation of state statutes.

### **ARGUMENT**

#### **I. THE LEGISLATURE HAS ENACTED SIGNIFICANT LEGISLATION REGULATING TOBACCO SALES TO PROTECT IDAHO'S PUBLIC HEALTH AND FISCAL SOUNDNESS**

As noted in the State's memorandum in support of its motion for a preliminary injunction, in 1999 the Legislature found that smoking presents serious public health concerns to Idaho and its citizens. *See* Idaho Code § 39-7801(a). The Legislature further determined that the financial burdens imposed on the State by smoking should be borne by tobacco companies, rather than by the State, to the extent that such companies either determine to enter into settlement agreements with the State or are found culpable by the courts. *See* Idaho Code § 39-7801(d).

In November 1998, leading United States tobacco companies entered into a settlement agreement, entitled the "Master Settlement Agreement" (MSA) with Idaho.<sup>3</sup> The MSA has been described by the United States Supreme Court as a "landmark" public health agreement,

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<sup>3</sup> The MSA is a lengthy public document. It was reviewed and approved by the district court in State v. Philip Morris et al., Case No. CV OC 9703239D, Fourth Judicial District, Ada County (Dec. 3, 1998) (Eismann, D.J.) *See* Consent Decree and Final Judgment, § VII.A. The MSA is electronically available at <http://www2.state.id.us/ag/consumer/tobacco/MSA.pdf>. The Court may take judicial notice of the MSA. I.R.E. 201.

Lorillard Tobacco Corp. v. Reilly, 533 U.S. 525, 533 (2001), that addresses “one of the most troubling public health problems facing the Nation today.” Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

Promptly after the MSA was executed, the Legislature declared that it would be contrary to the policy of the State if a tobacco manufacturer could decide not to enter into such a settlement agreement (nonparticipating manufacturers) and thereby use the resulting cost advantage vis-à-vis settling tobacco companies to derive large profits in the years before liability may arise, without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. This legislative determination was driven, in part, by the fact that many diseases caused by tobacco use often do not appear until many years after the affected individual begins smoking. *See* Idaho Code § 39-7801(a) & (f).

The Legislature thus determined that it is in the interest of the State to require that tobacco manufacturers who determine not to enter into the MSA establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. *See* Idaho Code § 39-7801(f). In pursuit of the objective, the Legislature passed the Idaho Tobacco Master Settlement Agreement Act (Idaho MSA Act) shortly after the MSA was signed. The Idaho MSA Act requires tobacco companies to either (1) join the Master Settlement Agreement or (2) place into a qualified escrow fund the amounts required by Idaho Code Section 39-7803(b)(1) of the Act. This fund is then available to pay any judgment the State may obtain against a culpable company. Idaho Code § 39-7803(b) (2).

In 2003, the Legislature determined that violations of the Idaho MSA Act by various non-participating manufacturers threatened not only the integrity of the MSA, but also the fiscal

soundness of the State and public health and responded with provisions to help prevent such violations through adoption of the Complementary Act. *See* Idaho Code § 39-8401. Relevant to this case, as noted above, Section 39-8403 of the Act establishes the Idaho Directory and makes it unlawful for any person to sell, offer or possess for sale in Idaho cigarettes of a tobacco product manufacturer or brand family not included on the Idaho Directory.<sup>4</sup>

## **II. LEGAL STANDARDS FOR REVIEWING A MOTION TO DISMISS FOR LACK OF SUBJECT JURISDICTION ARE SETTLED**

Motions to dismiss are viewed “with disfavor because of the probable waste of time in case of a reversal of a dismissal of the action,” and because the “objective of the law is to obtain a determination of the merits of the claim.” Hadfield v. State, 86 Idaho 561, 568, 388 P.2d 1018, 1022 (1964). In reviewing motions to dismiss, “every reasonable intendment will be made to sustain a complaint.” Harper v. Harper, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct.App. 1992). In fact, “as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief.” *Id.* Motions to dismiss for failure to state a claim admit the facts alleged in the complaint. Turnboo v. Keele, 86 Idaho 101, 108, 383 P.2d 591 (1963). Moreover, the State is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. Idaho Schs. for Equal Educ. Opportunity v. Evans, 123 Idaho 573, 578, 850 P.2d 724, 729 (1993).

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<sup>4</sup> The Idaho Directory is maintained and administered by the Attorney General, pursuant to Idaho Code Section 39-8403 of the Complementary Act. The Directory is available at [http://www2.state.id.us/ag/consumer/tobacco/directory\\_index.htm](http://www2.state.id.us/ag/consumer/tobacco/directory_index.htm). The Directory, in part, lists the various cigarette brands which may be sold in Idaho. The Court may take judicial notice of this official government report. I.R.E. 201.

### **III. IDAHO LAW APPLIES TO AND PROHIBITS NATIVE WHOLESALE'S CIGARETTE SALES AND SHIPMENTS**

Native Wholesale argues that the Complementary Act does not apply to it. The route Native Wholesale takes to arrive at this conclusion is tortuous to say the least and certainly not supported by applicable law.

Native Wholesale's theory begins with the premise that the Idaho MSA Act—a law not at issue in this case and which the State has not alleged Native Wholesale is violating—imposes a requirement that tobacco manufacturers deposit into an escrow account certain amounts of money for those cigarettes for which an Idaho cigarette tax stamp has been affixed.<sup>5</sup> Native Wholesale then proceeds to argue that the Complementary Act—a law that is at issue in this case and which the State has alleged Native Wholesale is violating—also only applies to the sale or shipment of Idaho state-taxed-stamped cigarettes. Thus, since Native Wholesale's cigarette sales to Warpath, Inc., do not require Idaho state cigarette tax stamps to be affixed, it concludes that the Complementary Act does not apply to it. Defendant's Memorandum in Support of Motion to Dismiss (Def. Memo.), p. 10. Native Wholesale misconstrues the scope of the Complementary Act and errs in its conclusion.

It is true that wholesalers do not need to affix a cigarette excise tax stamp to cigarette packs sold to a retail outlet located on an Indian reservation and wholly owned and operated by

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<sup>5</sup> The reason the Idaho MSA Act is not at issue in this case is that the law imposes duties upon tobacco product manufacturers, not tobacco wholesalers or retailers. *See* Idaho Code § 39-7803. The law does not apply to Native Wholesale because it is a cigarette wholesaler, not a tobacco product manufacturer. Idaho Code § 39-7802(i) (tobacco product manufacturer is an entity that manufactures cigarettes). The Complementary Act, on the other hand, applies, in part, to “any person” who acquires, holds, owns, possesses, transports, imports, and/or causes to be imported for sale and distribution in Idaho cigarettes. *See* Idaho Code § 39-8403(3). That is precisely what Native Wholesale has done here and why the Complementary Act applies to it. In addition, because Native Wholesale is wholesaling its cigarettes, Idaho's cigarette tax laws apply. *See* Idaho Code §§ 63-2502(a) and 63-2503(1) (wholesaler is every person who purchases, sells, or distributes cigarettes to other wholesalers or to retailers for the purpose of resale and persons who wholesale cigarettes must have a permit from the Tax Commission).



an enrolled member of and Idaho Indian Tribe. *See* Idaho State Tax Commission Idaho Cigarette and Tobacco Product Tax Administrative Rule 14, IDAPA 35.01.10.014. It is also true that the cigarettes subject to the Idaho MSA Act are those cigarettes for which an Idaho cigarette tax stamp has been affixed. *See* Idaho Code §§ 39-7802(j) and 39-7803. But these two legal conclusions do not mean that the Complementary Act addresses only such cigarettes. It instead covers more than just Idaho tax-stamped cigarettes.<sup>6</sup> Indeed, the Complementary Act prohibits the sale of **all** non-compliant **cigarettes**, a defined term that incorporates both stamped cigarettes (units sold) **and** unstamped cigarettes. *See* Idaho Code § 39-8403(3).<sup>7</sup> Thus, for Native Wholesale's statement that the Complementary Act only applies to Idaho tax-stamped cigarettes to be true, this Court would have to replace by judicial fiat the word "cigarette" in Idaho Code Section 39-8403(3) of the Complementary Act with the term "units sold" or "Idaho tax-stamped cigarette," which it neither can nor would do. Matter of Adoption of Chaney, 126 Idaho 554, 558, 887 P.2d 1061, 1065 (1995) ("[W]e have held that we cannot insert into statutes terms or provisions which are obviously not there."). Rather than replacing a term that the Legislature has specifically defined and provided for in the law, as Native Wholesale in practical effect urges, courts do the exact opposite, which is to "presume that a legislature says in a statute what

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<sup>6</sup> The Idaho MSA Act applies to Idaho tax-stamped cigarettes, which it refers to as "units sold," and which it defines as the "number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) . . . as measured by excise taxes collected by the state on packs . . . bearing the excise tax stamp of the state." Idaho Code § 39-7802(j).

<sup>7</sup> Idaho Code Section 39-8402(2) of the Complementary Act states that the term cigarette has the same meaning as that term is defined in Section 39-7802(d) of the Idaho MSA Act, which is any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette. A cigarette is also defined to be .09 ounces of 'roll-your-own' tobacco i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. At no point is cigarette defined in relation to whether it is stamped.

it means and means in a statute what it says there.” Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

The argument raised by Native Wholesale here was put forth by an Internet tobacco retailer in a case before the Honorable Kathryn Sticklen in State v. Scott Maybee, Case No. CV OC 0617645. Fourth Judicial District, Ada County (Feb. 26, 2008). In the Maybee case, the defendant argued against the imposition of civil penalties for violating the Complementary Act because of his alleged belief that the Act only applies to units sold. The Court rejected the contention, noting that the Complementary Act applies to the sale of non-compliant cigarettes, not just non-compliant units sold cigarettes. February 26, 2008 Memorandum Decision and Order, pp. 5-6.<sup>8</sup>

In short, by its express terms, the Complementary Act applies to and prohibits that which the State alleges Native Wholesale has engaged in here, which is to sell cigarettes that are not listed on the Idaho Directory. There is nothing in that law, or in any other Idaho law for that matter, to countenance or support Native Wholesale’s position that the Complementary Act is limited only to Idaho tax-stamped cigarettes.<sup>9</sup>

#### **IV. INDIAN LAW DOES NOT PROHIBIT APPLICATION OF THE COMPLEMENTARY ACT**

Native Wholesale contends that the Indian Commerce Clause preempts the Idaho MSA Act and Idaho’s cigarette tax laws as they relate to Native Wholesale’s cigarette sales. Def.

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<sup>8</sup> Accordingly, the Court assessed a civil penalty of \$163,225 as a result of Maybee’s sale of 2.5 million non-compliant cigarettes. A true and correct copy of Judge Sticklen’s decision is attached to this memorandum for the Court’s convenience in reviewing.

<sup>9</sup> Native Wholesale’s citation to one paragraph from the State’s 46-page brief in a different lawsuit brought by the State against various tobacco manufacturers, *see* Def. Memo., p. 10, Exhibit A, is without context. In that paragraph, the State was trying to point out that cigarettes that fall under the interstate commerce definition of Tax Commission Rules are not “units sold” under the Idaho MSA Act, because they do not yet have the tax stamp affixed. It is only later when those cigarettes are stamped that they become units sold. The statement most assuredly is not an admission in this case, as Native Wholesale incorrectly states, that it can sell noncompliant cigarettes without regard to the Complementary Act.

Memo. p. 11. Again, the Idaho MSA Act is not at issue in this case and thus the question is whether Indian law principles preclude the Complementary Act and Idaho's cigarette tax laws from being given their natural application.

Applicable Supreme Court precedent indicates that the Indian Commerce Clause provides no basis for Native Wholesale to assert preemption of Idaho's state law claims here. First, it is important to note that the "central function" of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, "is to provide Congress with plenary power to legislate in the field of Indian affairs." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). There is nothing in the Indian Commerce Clause which operates to preempt or curtail state law claims akin to the negative or dormant function possessed by the Interstate Commerce Clause. Thus, in Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982), the Supreme Court rejected the United States' request to "rely on the dormant Indian Commerce Clause . . . to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue." *Id.* at 845. In the Court's view, "the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General" since, "[a]lthough clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue." *Id.* at 846; *accord* Cotton Petroleum, 490 U.S. at 192. In sum, the Indian Commerce Clause merely empowers Congress to act and has no independently

preemptive function such to support Native Wholesale's claim of preemption. *See also Omaha Tribe v. Miller*, 311 F. Supp. 2d 816, 822 (S.D. Iowa 2004); *Ward v. New York*, 291 F. Supp. 2d 188, 199 (W.D.N.Y. 2003).<sup>10</sup> That the Indian Commerce Clause has no preemptive effect does not mean that there might not be federal law at play. Review of that law indicates, however, that neither application of the Complementary Act nor Idaho's cigarette tax laws is preempted.

Where federal law is concerned, several principles are important to note. First, it is settled that a State can regulate activities of tribal members that take place within the reservation but have an impact outside the reservation and that off reservation activity of a tribal member may also be regulated by a State. For example, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Supreme Court was asked to prohibit New Mexico from imposing a gross receipts tax on revenue generated from a tribal ski resort and a use tax on materials employed in constructing the resort's lifts. The resort was located adjacent to but outside the tribe's reservation on land leased from the United States Forest Service. *Id.* at 146. The resort's location was critical because "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Id.* at 148. "[T]ribal activities conducted outside the reservation present different considerations[.]" however, and in that situation "[a]bsent express federal law to the contrary,

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<sup>10</sup> Native Wholesale states that the "United States Supreme Court has determined that the Indian Commerce Clause preempts state taxes that sweep too broadly—by seeking to tax Indian activities both on and off Indian country. *See Colville*, 447 U.S. 134." Def. Memo. pp. 11-12. The Supreme Court determined no such thing. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 150-62 (1980) the Court held, among other things, that Washington's cigarette and sales taxes on on-reservation purchases by nonmembers of the tribe are valid. Concerning the Indian Commerce Clause, the *Colville* Court stated "[t]he Indian Commerce Clause does not, of its own force, automatically bar all state taxation of matters significantly touching the political and economic interest of the Tribes." *Id.* at 136. As discussed above, two years later the Supreme Court definitively closed the door on the Indian Commerce Clause as a basis for preempting state law in *Ramah Navajo*, and later re-affirmed this principle in *Cotton Petroleum*.

Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

With that principle in mind, the Court found the gross receipts tax permissible, given the resort's location, but deemed the use tax preempted by virtue of a provision in the Indian Reorganization Act, 25 U.S.C. § 465, which proscribes taxation of land taken into trust for a tribe or tribal member. On the latter point, it reasoned that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465," 411 U.S. at 155 n.11, since the ski lifts had been permanently attached to the land and "[t]he jurisdictional basis for use taxes is the use of the **property** in the State." *Id.* at 158 (emphasis added). The differing result with regard to the use tax thus derived from the combination of an explicit congressional directive satisfying the "express federal law to the contrary" exception to the general rule and the nature of the conduct that triggered the tax obligation as a matter of state law.

The Supreme Court applied Mescalero Apache more recently in Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005), where it upheld imposition of a state fuel tax on an off-reservation distributor with respect to purchases by a tribal retailer for on-reservation sale. The Court rejected the proposition that the tax's validity must be assessed under the interest-balancing test governing on-reservation transactions prescribed in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), a case relied upon by Native Wholesale and discussed further below, because "[w]e have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country." *Id.* at 112. That "altogether different course" was Mescalero Apache which controlled in light of the off-reservation "where" of the Kansas fuel tax—*i.e.*, the fact that the tax accrued upon receipt of the fuel by the distributor at its off-

reservation place of business. The Court reasoned, "the 'use, sale or delivery' that **triggers** tax liability is the sale or delivery of the fuel to the distributor." *Id.* at 107 (emphasis added).

Mescalero Apache and Wagnon establish the fundamental framework against which Native Wholesale's Indian law-based preemption claim must be measured. The requirements of the Complementary Act or Idaho's cigarette tobacco tax laws are "trigger[ed]" for present purposes by Native Wholesale's **introduction** of tobacco into this State through its sales, importing, and causing to import cigarettes into Idaho. The triggering "where" of the transaction is thus Idaho, not Native Wholesale's New York place of business. Native Wholesale is treated no differently than other wholesalers, and the fact that it is located on a reservation is thus irrelevant to this case.

In sum, Native Wholesale's liability for violating the Complementary Act and Idaho's cigarette tax laws stems from its illegal tobacco sales to Idaho businesses. This violation does not depend upon where Native Wholesale does business; *i.e.*, the "trigger[ing]" event for statutory coverage is the fact that Native Wholesale causes cigarettes to be introduced into this State—an off-reservation activity. Mescalero Apache thus militates directly against Native Wholesale's Indian law-based preemption claim as the Maine Supreme Court held recently in Department of Health and Human Services v. Maybee, 965 A.2d 55 (Me. 2009), where it enforced that state's retail tobacco vendor license requirements against a tribal-member-owned online retailer located on a New York reservation. It reached this conclusion, in part, because the tobacco retailer's "interactions with consumers in Maine extend beyond the boundaries of the reservation." *Id.* at 57. The court held instead that "[a]ctivity of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states." *Id.* at 57-58. In so holding, it relied upon Nevada v. Hicks, 533 U.S. 353, 362-66 (2001), where

the Supreme Court determined that, in the absence of federal legislation to the contrary, a State had the authority to execute a search warrant on a reservation against a tribal member suspected of violating state law outside the reservation.<sup>11</sup>

Native Wholesale mistakenly relies upon White Mountain Apache Tribe v. Bracker as support for its position. Bracker involved the question whether Arizona could impose motor carrier license and use fuel taxes on a nontribal firm with respect to on-reservation timber hauling undertaken pursuant to a contract with the resident tribe and sets forth the following test for when a State may regulate commercial transactions between tribes and nonmembers that occur on reservation:

In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 144-45.

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<sup>11</sup> It bears noting that the Hicks court derived the doctrinal basis for this determination from two decisions—Colville and Mescalero Apache:

“When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.” **When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land**, as exemplified by our decision in [Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)]. In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could ‘impose at least “minimal” burdens on the Indian retailer to aid in enforcing and collecting the tax[.]’ It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) (some citations omitted). (Emphasis added)

533 U.S. at 362.

Bracker dealt with state taxation of an on-reservation relationship between a tribe and a nonmember. It simply does not apply here because Native Wholesale's sales and shipments of cigarettes to retail businesses in Idaho extend beyond the boundaries of the reservation where it is located and because Native Wholesale is a corporation, not a tribal member.<sup>12</sup>

In any event, even were Bracker applicable, as the quote above indicates it does not necessarily bar the applicable state law. It instead mandates a test that balances applicable federal, state and tribal interests. Applying that test here, enforcement of the Complementary Act and Idaho's cigarette tax laws would be upheld.

Concerning the federal interest "the federal government has been generally supportive of state regulation of cigarette sales." Ward, 291 F. Supp.2d at 204. Native Wholesale certainly identifies no contrary congressional directive with respect to Idaho's Complementary Act and administration of its cigarette tax laws. Federal law also supports state cigarette tax efforts. For example, a provision of federal law known as the "Jenkins Act," codified at 15 U.S.C. § 376, mandates that out-of-state cigarette retailers report monthly to a State's tax or revenue commission all sales made to residents of the tax commission's state.

Concerning the State's interest, Idaho's interest in regulating tobacco is self evident. As noted above, the Legislature has found that smoking presents serious public health concerns to Idaho and its citizens. *See* Idaho Code § 39-7801(a). The Legislature further determined that the financial burdens imposed on the State by smoking should be borne by tobacco companies,

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<sup>12</sup> The Supreme Court has made clear that States have the authority "absent congressional prohibition[] to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 257-58 (1992). Consequently, even were it assumed *arguendo* that Native Wholesale's transactions occurred wholly within a reservation, it would stand in no better shoes for Indian law-based preemption purposes than any other nonmember entity engaged in the same activity. Native Wholesale does not suggest (and cannot) that the latter would be immune from application of the Complementary Act or the tax provisions at issue here.



rather than by the State, to the extent that such companies either determine to enter into settlement agreements with the State or are found culpable by the courts. *See* Idaho Code § 39-7801(d). The State's interest in regulating the sale of this dangerous product cannot be gainsaid. Idaho also has an interest in the effective and efficient administration of its cigarette tax laws. It cannot administer these laws if wholesalers, with impunity, can ignore the requirement that they obtain a permit from the Tax Commission. In short, the state interests implicated presently are significant and Native Wholesale says nothing to undercut them.

The final consideration—the relevant tribal interest—is not helpful to Native Wholesale. The burden upon the Seneca Nation's tribal interests in Native Wholesale (a business incorporated under a different tribe's corporate code) complying with Idaho law with respect to its cigarette sales to Idaho businesses is not apparent. It is far less intrusive on Native Wholesale's time and resources than the record-keeping and tax collection duties approved in Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976),<sup>13</sup> and Colville.<sup>14</sup>

#### **V. INDIAN LAW DOES NOT PROHIBIT APPLICATION OF IDAHO'S CIGARETTE TAX LAWS**

Native Wholesale contends that Idaho's cigarette tax laws do not apply to it because "it sells only to Indian customers for delivery not in Idaho." Def. Memo. p. 12. Native Wholesale's

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<sup>13</sup> Moe involved a challenge to Montana's method for assessment and collection of personal property taxes as applied to reservation Indians. Moe contains four holdings, one of which is of relevance here and which is that Montana could require tribal retailers to collect and remit cigarette taxes imposed on non-Indians with respect to reservation sales. 425 U.S. at 480-81, 483. As to this holding, the Supreme Court stated that requiring an Indian tribal seller to collect a tax validly imposed on a non-member of the Tribe is a minimal burden that does not frustrate tribal self-government and is not prohibited by congressional enactment. *Id.* at 483.

<sup>14</sup> In Colville, the Supreme Court, in addition to upholding Washington's sales and cigarettes taxes on on-reservation purchases by nonmembers of the Tribe, also upheld Washington's authority to impose robust regulatory obligations on tribal retailers with respect to nonmember cigarette sales—*i.e.*, maintaining "detailed records of exempt and nonexempt sales in addition to simply precollecting the tax." 447 U.S. at 151. It reasoned that "[t]he simple collection burden imposed by Washington's cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in Moe." *Id.*

claims are contradicted by the record and are not grounds for operating as a cigarette wholesaler without the tobacco permit required by Idaho law.

The fact is that Native Wholesale, without an Idaho tobacco permit, sells and ships its cigarettes, at wholesale, to Warpath, Inc., an Idaho corporation located in Plummer, Idaho. *See* Second Affidavit of Beth Kittelmann, pp. 2 - 7, ¶¶ 3 - 20. Further, Warpath sells these cigarettes, in part, to members of the general public, including persons who are not Native Americans. *See* Affidavit of Mark Ausman, pp. 1 - 2, ¶¶ 2 - 5. It is thus irrefutable that Native Wholesale “sells or distributes cigarettes to other wholesalers or to retailers for the purpose of resale,” the definition of wholesaler under Idaho’s cigarette tax laws, *see* Idaho Code § 63-2502(a). Equally clear is the fact that it is “unlawful for a person to act as a wholesaler of cigarettes without a permit[.]” Idaho Code § 63-2503(1)—the very activity engaged in by Native Wholesale. In short, Idaho’s cigarette tax laws directly apply to Native Wholesale.

Native Wholesale cites to Mahoney v. State Tax Comm’n, 96 Idaho 59, 524 P.2d 187 (1974), *cert. denied* 419 U.S. 1089, and its ruling that the imposition of Idaho state cigarette taxes upon on-reservation sales by an Indian seller are preempted. *See id.*, at 62, 524 P.2d at 190. First, Mahoney has been effectively overruled by subsequent United States Supreme Court decisions. It grounded its federal law-preemption holding in the Indian Commerce Clause. *Id.* Later Supreme Court precedent, as discussed above, establishes not only that the Indian Commerce Clause does not preempt state law—*see Ramah Navajo*, 458 U.S. at 845-46, and Cotton Petroleum, 490 U.S. at 192—but that federal law does not bar a State from imposing cigarette taxes upon on-reservation sales to nonmembers of the tribe. *See Colville*, 447 U.S. at 150-62. Second, the obligation of Native Wholesale, a tribal nonmember, to have a tobacco **permit**, not to pay a cigarette tax, is at issue here. The requirement for a cigarette wholesaler to


obtain a tobacco permit, as developed above, does not depend upon whether the wholesaler's cigarette sales are taxable or not. Nothing in Mahoney establishes that such a minimal burden of obtaining a permit is preempted by federal law.

### **CONCLUSION**

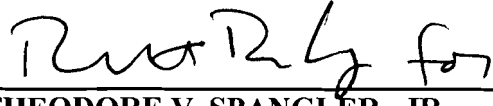
Based on the foregoing argument, the State and the Tax Commission respectfully request that this Court deny Native Wholesale's motion to dismiss on subject matter jurisdiction grounds.

DATED this 23<sup>rd</sup> day of June, 2009

**LAWRENCE G. WASDEN**  
**IDAHO ATTORNEY GENERAL**

By   
**BRETT T. DELANGE**  
**Deputy Attorney General**  
**Consumer Protection Division**

**IDAHO STATE TAX COMMISSION**

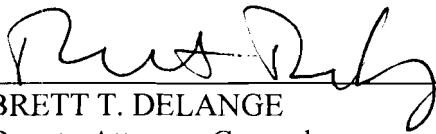
By  for  
**THEODORE V. SPANGLER, JR**  
**Deputy Attorney General**  
**State Tax Commission**

## CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of June, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile

  
BRETT T. DELANGE  
Deputy Attorney General

Exhibit

NO. \_\_\_\_\_ FILED  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

FEB 26 2008

J. DAVID NAVARRO, Clerk  
By J KENNEDY  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, by and through  
LAWRENCE G. WASDEN, Attorney General,

Plaintiff,

vs.

SCOTT B. MAYBEE, d/b/a  
SMARTSMOKER.COM,  
BUYCHEAPCIGARETTES.COM, and  
ORDERSMOKESDIRECT.COM,

Defendant.

Case No. CV-OC-0617645

MEMORANDUM DECISION  
AND ORDER

This case is before the Court on Defendant Scott B. Maybee's (Maybee's) motion to reconsider and Plaintiff State of Idaho's (the State's) request for entry of a money judgment for civil penalties. For the reasons that follow, Maybee's motion will be denied and the State's motion will be granted.

**FACTS AND PROCEDURAL HISTORY**

The State seeks an injunction and civil penalties against Maybee for violations of statutes enacted to implement the Tobacco Master Settlement Agreement (MSA). The underlying facts are set forth in the Court's Memorandum Decision and Order of October 31, 2007. In that decision the Court determined that Maybee was judicially estopped from asserting that his

1 tobacco sales did not take place in Idaho because Maybee had filed an affidavit in litigation in  
2 New York State averring that his sales were completed in the home states of the purchasers  
3 rather than New York State, in order to avoid payment of New York State taxes on his sales.  
4 After this Court issued its October 31, 2007 decision, Maybee went back to the New York court  
5 and asked to "correct" the affidavit by removing the language regarding where the sales took  
6 place. The New York court granted the motion, apparently finding no prejudice to the opposing  
7 party in that case. Armed with that order, Maybee now moves for reconsideration of this Court's  
8 conclusion that the relevant tobacco sales take place in Idaho.  
9

10 This Court has not been favored with any record as to how Maybee got the New York  
11 court to allow him to withdraw the affidavit. Regardless, the order of the New York court did  
12 not cause the affidavit filed therein to cease to exist. Maybee cannot create a genuine issue of  
13 material fact by taking inconsistent positions regarding where his sales take place. This situation  
14 is precisely what judicial estoppel was intended to avoid.

15 However, the Court has reviewed the arguments of the parties concerning where  
16 Maybee's sales take place. As previously noted, Maybee relies on a provision of the Uniform  
17 Commercial Code (UCC) to argue that title to the cigarettes passes in New York when the  
18 cigarettes are shipped. There is no evidence in the record to support this contention, and it is  
19 doubtful that the UCC even applies in this instance, particularly since the tobacco settlement  
20 statutes are public health regulations. The Court reaffirms its findings that Maybee's sales take  
21 place in Idaho.  
22

23 Alternatively the Prevention of Minors' Access to Tobacco Act (Minors' Access Act or  
24 MAA), Idaho Code § 39-5701, et seq., by virtue of Idaho Code § 39-5702(2), specifically  
25 includes within its scope the sale of tobacco products over the Internet, referred to as "delivery  
26

1 sales.” Maybee does not dispute that his sales are delivery sales within the meaning of the  
2 statute. Each permittee<sup>1</sup> taking a delivery sale order must comply with some specific statutory  
3 requirements and must comply with “all other laws of the State of Idaho generally applicable to  
4 sales of tobacco products that occur entirely within Idaho including, but not limited to, those laws  
5 imposing excise taxes, sales and use taxes, licensing and tax stamping requirements and escrow  
6 or other payment obligations.” Idaho Code § 39-5714. Based on this language, Maybee’s  
7 compliance with the law is not dependent upon where the sale takes place, but is dependent only  
8 upon the taking of the delivery sale order, which Maybee indisputably does. The Master  
9 Settlement Agreement Complimentary Act (MSACA), Idaho Code § 39-8401, et seq., and  
10 specifically Idaho Code § 39-8403(3)(b), makes it unlawful for any person to “sell, offer, or  
11 possess for sale in this state,” non-compliant cigarettes. (Emphasis added.) Maybee clearly falls  
12 within the application of the relevant statutes. The motion for reconsideration is denied.  
13

14         The State submitted a proposed final judgment, to which Maybee objected. The Court  
15 has reviewed the proposed judgment in light of the objections, taking into account the provisions  
16 of Rule 55(a), I.R.C.P. Under that rule, the judgment should not contain any recitation of the  
17 record of prior proceedings. Therefore, although the State requested in its complaint certain  
18 findings, there is no need to include them in the judgment, since they have been made in the  
19 earlier memorandum decision and order. For the same reasons, there is no reason to incorporate  
20 into the judgment the findings requested by Maybee.  
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22  
23  
24

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25 <sup>1</sup> The fact that Maybee has failed to obtain a permit does not make his sales any less subject to the provisions of the  
26 MAA.



1 Next, Maybee objects to any injunctive relief based on the Master Settlement Agreement  
2 Complimentary Act (MSACA), Idaho Code § 39-8401, et seq. First, he correctly argues that  
3 such relief was not requested in the complaint. The complaint did, however, request such other  
4 and further or different relief as the Court considered appropriate. The State also requested such  
5 injunctive relief in its motion for summary judgment. In his lengthy response to that motion,  
6 Maybee did not address or object to the request for injunctive relief under the MSACA. The  
7 Court found that the State was entitled to such relief. Idaho law is clear that a court can afford all  
8 relief to which a party is entitled, even if not requested in the pleadings. *Collins v. Parkinson*, 96  
9 Idaho 294, 527 P.2 1252 (1974).  
10

11 Idaho Code § 39-8403(3)(b), makes it unlawful for any person "To sell, offer or possess  
12 for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in  
13 the directory; . . ." Idaho Code § 39-8407(5) provides that any person who violates Idaho Code §  
14 39-8403(3) also violates the Idaho Consumer Protection Act (ICPA), Idaho Code § 48-601, et  
15 seq. The ICPA clearly authorizes the attorney general to seek injunctive relief and the court to  
16 order it. See Idaho Code § 48-606(1) and Idaho 48-607(1). The State is entitled to such relief,  
17 but the judgment will reflect the language of the MSACA.  
18

19 Lastly, Maybee now objects to the State's request for a \$500,000.00 civil penalty, costs  
20 and attorney fees. Here again, the issue of an appropriate civil penalty was addressed in the  
21 State's motion for summary judgment, but was not discussed by Maybee or by the Court. Idaho  
22 Code § 39-8406 provides:  
23  
24  
25  
26

1                   **§ 39-8406. Penalties and other remedies**

2                   (1) Each stamp affixed, each sale or offer to sell, and each cigarette  
3                   possessed in violation of section 39-8403(3), Idaho Code, shall constitute a  
4                   separate violation. For each violation hereof, the district court may impose a civil  
5                   penalty in an amount not to exceed the greater of five hundred percent (500%) of  
6                   the retail value of the cigarettes or five thousand dollars (\$5,000) upon a  
7                   determination of violation of section 39-8403(3), Idaho Code, or any rule adopted  
8                   pursuant thereto.

9                   . . . .

10                  (4) The attorney general may seek an injunction to prevent or restrain a  
11                  threatened or actual violation of section 39-8403(3), 39-8405(1) or 39-8405(4),  
12                  Idaho Code, by a stamping agent and to compel the stamping agent to comply  
13                  with such subsections.

14                  (5) A person who violates section 39-8403(3), Idaho Code, engages in an  
15                  unfair and deceptive trade practice in violation of the Idaho consumer protection  
16                  act, chapter 6, title 48, Idaho Code.

17                  Maybee argues that only minimal penalties are appropriate and/or that there are issues of  
18                  fact as to Maybee's good faith or reasonable belief that his actions were lawful based on his  
19                  attorney's advice and his compliance with federal law and this Court's October 2007 order. The  
20                  State asserts that a substantial penalty is appropriate, particularly since Maybee unlawfully  
21                  continued to sell cigarettes in Idaho after receiving the State's letter concerning the alleged  
22                  violations, the complaint in this case, and the default judgment entered against him in November  
23                  of 2006 enjoining such sales.

24                  The Court finds that a civil penalty is warranted in this case. Although Maybee asserts  
25                  that this is a case of first impression, or at least the first ruling on the issues presented, it is clear  
26                  from the record that Maybee was involved in at least one, and probably several other cases of this  
27                  type. The Court is not persuaded that Maybee had a reasonable belief that the MSACA applied  
28                  only to "units sold" measured by "excise taxes collected by the State on packs . . . bearing the


1 excise tax stamp of the state.” Idaho Code § 39-7802(j). Idaho Code § 39-7802(j) is part of the  
2 MSACA, which applies only to manufacturers. However, the MSACA clearly makes it unlawful  
3 for anyone to sell cigarettes of manufacturers or families not included on the directory, not “units  
4 sold.” While Maybee did raise some interesting arguments regarding Indian law, this was not  
5 one of them. Maybee also continued to sell such cigarettes even after he received a default  
6 judgment assessing civil penalties and enjoining him from all sales until he obtained an MAA  
7 permit.

8 The Court does, however, find a \$500,000.00 penalty is unwarranted. Setting the amount  
9 of the penalty is in the discretion of the Court. The State has provided information regarding the  
10 number of cigarettes sold by Maybee in violation of the MSACA, as well as various methods by  
11 which such penalty might be calculated. The Court finds it appropriate to assess a civil penalty  
12 of \$163,225.00, which represents the full retail price of all of Maybee’s sales in Idaho. This  
13 penalty takes all of the gain out of Maybee’s failure to comply.

14 The State is also the prevailing party in this case and is entitled to an award of costs and  
15 attorney fees pursuant to Idaho Code § 39-8407(5), upon presentation of a timely Memorandum  
16 of Costs and Attorney Fees. The amount of such an award will be determined at a later time.  
17

18 IT IS SO ORDERED.

19 Dated this 26<sup>th</sup> day of February 2008.

20  
21   
22 Kathryn A. Sticklen  
23 District Judge  
24  
25  
26

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

BRETT T DELANGE  
DEPUTY ATTORNEY GENERAL  
CONSUMER PROTECTION UNIT  
LEN B JORDAN BUILDING  
650 WEST STATE STREET LOWER LEVEL  
POST OFFICE BOX 83720  
BOISE IDAHO 83720-0010

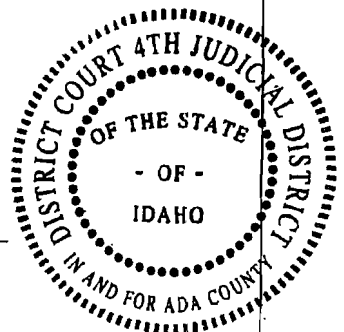
DEBORA K KRISTENSEN  
GIVENS PURSLEY LLP  
601 WEST BANNOCK STREET  
POST OFFICE BOX 2720  
BOISE IDAHO 83701-2720

MARGARET A MURPHY  
LAW OFFICES OF  
MARGARET A MURPHY  
54 HOLLYWOOD AVENUE  
BUFFALO NEW YORK 14220

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

By Kennedy  
Deputy Clerk

Date: 7/26/08



**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**Attorneys for the State of Idaho**

NO. \_\_\_\_\_ FILED 433  
A.M. \_\_\_\_\_ P.M.

**JUN 23 2009**

**J. DAVID NAVAHO, Clerk  
By L. AMERSON  
DEPUTY**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**AFFIDAVIT OF MARK AUSMAN**

STATE OF IDAHO )  
 ) ss.  
COUNTY OF NEZ PERCE )

Mark Ausman, being first duly sworn, deposes and says:

1. My name is Mark Ausman. I am a Tax Compliance Officer in the Lewiston Field Office of the Idaho State Tax Commission (ISTC). I have been a Compliance Officer with ISTC since March 1989. I make this Affidavit from personal knowledge.

2. On June 9, 2009, I visited the Warpath Smoke Shop, located in Plummer, Idaho. I asked the clerk for a pack of Seneca cigarettes. The clerk directed me to a box of cigarettes that contained Seneca cigarette packs. I obtained one and paid \$2.55 for the pack.

**AFFIDAVIT OF MARK AUSMAN - 1**

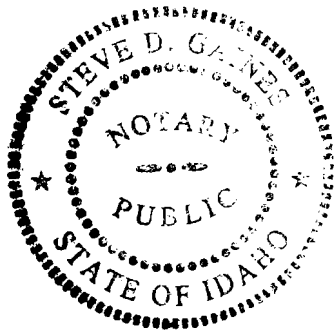
**ORIGINAL**  
b00192L

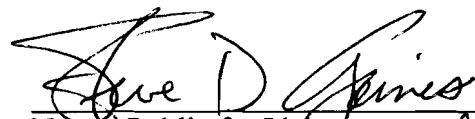
4. I attach to this affidavit a true and correct copy of the receipt showing my purchase of the Seneca pack of cigarettes, as well as a copy of the Seneca pack of cigarettes that I purchased.

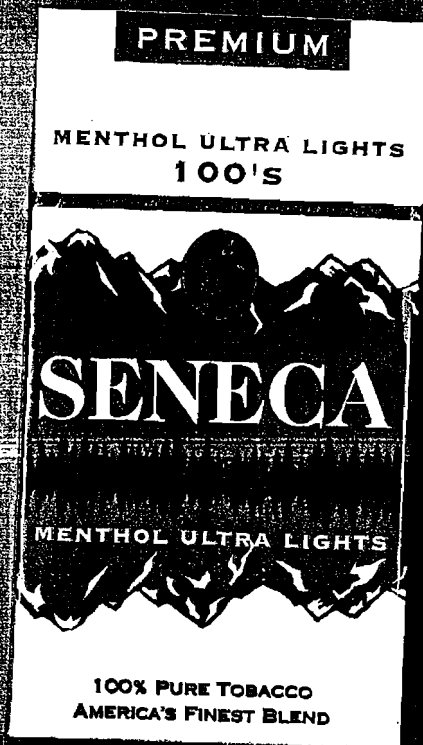
5. I am not a member of the Coeur d'Alene Tribe or indeed a member of any Native American Tribe.

  
MARK AUSMAN

SUBSCRIBED AND SWORN to before me this 17 day of June, 2009.



  
Notary Public for Idaho  
Residing at: Lewiston, ID  
My Commission Expires: 4-4-13



Warpeth Smokeshop  
Plummer ID  
(208) 686-0217

DATE 06/09/2009 TUE TIME 11:12

MISC. T1	\$2.55
TOTAL	\$2.55
CASH	\$20.00
CHANGE	\$17.45

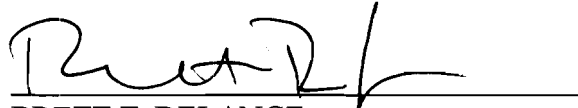
Thank You:  
Have a Nice Day!  
DOUG No.016951 00001

### CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> day of June, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



BRETT T. DELANGE  
Deputy Attorney General



JUN 23 2009

ORIGINAL 000196

STATE OF IDAHO                    )  
  ) ss.  
County of Ada                    )

Beth A. Kittelmann, being first duly sworn, deposes and says:

1. I am a Paralegal for the Consumer Protection Division of the Office of the Idaho Attorney General. One of my duties is to oversee and maintain records received and compiled by the Office of the Attorney General that relate to the matters set forth in this Affidavit. Relevant to this case, I maintain the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho Directory) and ensure that all cigarettes and roll-your-own tobacco sold to Idaho consumers and retailers are of compliant brands and manufacturers certified for sale in Idaho and listed on the Idaho Directory. In addition, when information is received regarding tobacco sales made to Idaho consumers, I verify whether the tobacco manufacturer and/or distributor is in compliance with applicable Idaho laws and regulations regarding sales into Idaho. Finally, when the Office of the Attorney General serves a subpoena or a civil investigative demand related to the office's enforcement of various Idaho tobacco sales laws, I am the custodian of all documents and information received pursuant thereto.

2. The duties I have outlined above are done in the regular course of the Office's duties under the Idaho Tobacco Master Settlement Agreement Complementary Act (Complementary Act), codified at Title 39, Chapter 84, Idaho Code. Within this capacity and as a result of my duties, I have personal knowledge and information of the facts set forth herein, as well as their accuracy. I also have personal knowledge of the records referred to in this Affidavit.

3. Since at least January 1, 2004, Native Wholesale, a business located in New York, has acquired, held, owned, possessed, transported, imported, and/or caused to be imported for

sale and distribution in Idaho two cigarette brands – Seneca and Opal – that are manufactured by Canadian-based tobacco manufacturer Grand River Enterprises Six Nations Ltd. (Grand River).

4. Native Wholesale's sales have totaled over 92 million cigarettes. None of the Seneca and Opal brand cigarettes Native Wholesale has sold has ever been listed on the Idaho Directory and approved for sale in Idaho.

5. On September 5, 2002, an Idaho district court issued an injunction (2002 injunction) against Grand River, prohibiting it from selling any cigarettes in Idaho "whether directly or through a distributor, retailer or similar intermediary or intermediaries." *See State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises*, CV OC 0205249M (4<sup>th</sup> Judicial District, Ada County). A copy of the 2002 injunction is attached hereto as Exhibit A.

6. The 2002 injunction was based on Grand River's violation of Idaho law related to tobacco sales. To date, Grand River has not satisfied the judgment entered on September 5, 2002, nor has it sought to have its cigarettes certified for sale in Idaho in compliance with the Complementary Act. As of today, cigarettes manufactured by Grand River remain illegal for sale in Idaho and Grand River remains enjoined from selling cigarettes in Idaho. Its cigarettes are not, nor have they ever been, on the Idaho Directory.

7. In May of 2008, the Office of the Attorney General obtained information indicating that Native Wholesale is selling Grand River's Seneca and Opal brand cigarettes to Idaho retailers. Accordingly, on June 5, 2008, the Attorney General notified Native Wholesale in a letter that its cigarette sales violated the Complementary Act. The Attorney General also advised Native Wholesale that the manufacturer of the cigarettes at issue, Grand River, was the

subject of the district court's 2002 injunction and that such cigarettes were not to be sold into Idaho. A true and correct copy of this letter is attached hereto as Exhibit B.

8. In his June 5, 2008 letter, the Attorney General instructed Native Wholesale to cease its unlawful selling and shipping of Grand River cigarettes to Idaho retailers. *See* Exhibit B.

9. The information obtained by the Office of the Attorney General indicates that Native Wholesale ships its cigarettes to the Nevada International Trade Corporation, also known as Foreign Trade Zone No. 89 (Nevada FTZ). Native Wholesale makes numerous cigarette sales to Warpath, Inc. Once a sale is made, Native Wholesale directs the Nevada FTZ to load the cigarettes on a Con-Way Freight truck (or sometimes a different trucking company's truck) destined for Warpath, Inc. Native Wholesale provides the instructions and necessary documentation for the receipt and storage of these cigarettes by the Nevada FTZ and pays for their shipping and handling. Native Wholesale instructs the Nevada FTZ when to release cigarettes from storage, and what cigarettes to release from storage. And – at least until August 2008 – Native Wholesale specifically instructed the Nevada FTZ to release them for transport to specified buyers in the buyers' State, including naming the carrier to be used to transport the cigarettes to that State. Native Wholesale, not Warpath, Inc., directs all releases from the Nevada FTZ to Idaho.

10. Based upon this information, on May 22, 2008, the Office of the Attorney General served a subpoena and civil investigative demand upon the Nevada International Trade Corporation, also known as Foreign Trade Zone No. 89 (Nevada FTZ). A true and correct copy of the subpoena and civil investigative demand is attached hereto as Exhibit C.

11. On September 17, 2008, the Office of the Attorney General served a subpoena and civil investigative demand upon Con-Way Freight, a shipper of Native Wholesale's cigarettes. A true and correct copy of the subpoena and civil investigative demand is attached hereto as Exhibit D.

12. On January 24, 2009, the Office of the Attorney General served a subpoena and civil investigative demand upon Warpath, Inc., the purchaser of Native Wholesale's cigarettes. A true and correct copy of the subpoena and civil investigative demand is attached hereto as Exhibit E.

13. The documents produced and the information provided pursuant to the subpoenas and civil investigative demands listed above are large in volume. Accordingly, I have caused true and correct copies of the documents to be placed on a CD-Rom, in pdf format, arranged in three files labeled "Nevada FTZ Records," "Con-Way Records," and "Warpath Records."

14. The information and documents obtained pursuant to the subpoenas and civil investigative demands mentioned above indicate that since January 2004, Native Wholesale has sold, shipped, or caused to be shipped cigarettes to Warpath, Inc., the total amount of cigarette sales per year as follows:

- A. **2004:** 24,650,000;
- B. **2005:** 21,406,000;
- C. **2006:** 22,830,000;
- D. **2007:** 24,442,000;
- E. **2008:** 15,000,000; and
- F. **2009 to date:** 2,508,000.

15. The information and documents obtained pursuant to the subpoenas and civil investigative demands show that since January 2004, Native Wholesale has sold, shipped, or caused to be shipped cigarettes to Warpath, Inc., on at least 51 different occasions. I have prepared an itemization of the shipments by Native Wholesale to Warpath, Inc., attached hereto as Exhibit F.

16. The information and documents obtained pursuant to the subpoenas and civil investigative demands mentioned above indicate the following cigarette sales to Warpath, Inc., since the Office of the Attorney General first wrote Native Wholesale Supply about its sales:

A. On June 13, 2008, Native Wholesale sold, imported and/or caused to be imported into Idaho 1,460,000 Seneca and Opal brand cigarettes.

B. On July 21, 2008, Native Wholesale imported and/or caused to be imported into Idaho 1,634,000 Seneca and Opal brand cigarettes.

C. On August 21, 2008 (two days after it was served with the summons and complaint in this case), Native Wholesale imported and/or caused to be imported 962,000 Seneca and Opal brand cigarettes.

D. Native Wholesale has also had Idaho sales in 2009 to date totaling 2,508,000 cigarettes.

17. The invoices for each of the shipments described above show the total price Native Wholesale billed for that shipment. Based only on the invoices obtained to date, Native Wholesale's gross income from Idaho sales totals more than \$4.4 million.

18. A complete certified copy of the Deposition of JoAnne Tornberg, dated November 20, 2008, is attached hereto as Exhibit G. I have not attached the exhibits to the

deposition due to their size and volume. They are available for filing should the Court wish to review them.

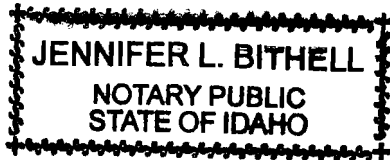
19. On August 14, 2008, Idaho informed the Nevada FTZ that the Native Wholesale cigarettes it was releasing for shipment to Idaho were contraband, and asked the Nevada FTZ to cease releasing such cigarettes for delivery to Idaho. The Nevada FTZ complied. A true and correct copy of the State's August 14, 2008 letter is attached hereto as Exhibit H.

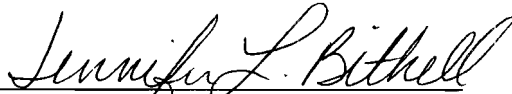
20. Following the Nevada FTZ's August 14, 2008 decision to comply with the State of Idaho's request, Native Wholesale continued to send instructions to the Nevada FTZ to release specified quantities and kinds of cigarettes for shipment to Idaho. However, from August 2008 to December 2008, Native Wholesale concealed from the Nevada FTZ the ultimate destination of these cigarettes, instructing the Nevada FTZ to release the cigarettes not to a common carrier for shipment to a final destination in Idaho, as was the case prior to August 2008, but instead back to Native Wholesale, which then made separate arrangements with carriers to pick up the shipments and forward them on to Warpath, Inc., without revealing to the Nevada FTZ their final destination. To further conceal the destination, Native Wholesale submitted invoices/bills of lading to the Nevada FTZ that show Native Wholesale as both the "buyer" and the seller. True and correct copies of several representative samples of Native Wholesale's post-August 2008 invoices/bills of lading which show it both as the "buyer" and seller of its cigarettes are attached hereto as Exhibit I. True and correct copies of several representative samples of Native Wholesale's pre-August 2008 invoices/bills of lading are attached hereto as Exhibit J.

//  
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//  
//  
//  
//  
//  
//  
//

  
BETH A. KITTELMANN

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of June, 2009.



  
Notary Public for Idaho  
Residing at Meridian, ID  
My Commission Expires: 11-30-13




## CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of June, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile

  
BRETT T. DELANGE  
Deputy Attorney General

ALAN G. LANCE  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Unit  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State St., Lower Level  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

NO. **COPY**  
A.M. FILED  
P.M.

SEP 05 2002

J. DAVID NAVARRO, Clerk  
By KRISTIN M. BROWN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
ALAN G. LANCE, Attorney General

Plaintiff,

vs.

GRAND RIVER ENTERPRISES, a foreign  
corporation,

Defendant.

Case No. CV OC 0205249M

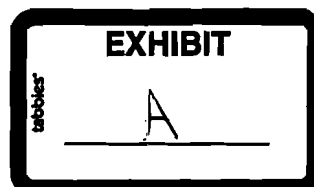
DEFAULT JUDGMENT

The Defendant, Grand River Enterprises, having been properly served, has failed to plead or otherwise defend within the time required. The Plaintiff, State of Idaho, has made application for entry of default judgment supported by the Affidavit of Failure to Plead or Otherwise Defend and the Affidavit of Brett T. DeLange in Support of Default Judgment.

**WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:**

1. The Defendant, Grand River Enterprises ("Grand River"), has violated Idaho's Tobacco Master Settlement Agreement Act (the "Act"), Idaho Code § 39-7801, et seq. by failing to establish a qualified escrow fund on behalf of the State of Idaho for cigarettes sold within the

DEFAULT JUDGMENT - 1



000205

State of Idaho for the time period of January 1, 2001 through December 31, 2001 and by failing to certify their compliance with the Attorney General of their escrow obligations.

2. The Defendant, Grand River, shall place into a qualified escrow fund the amounts required by Idaho Code § 39-7803(b)(1) of the Act on behalf of the State of Idaho for each year in which cigarettes are sold within the State of Idaho and certify their compliance to the Attorney General.

3. The Defendant, Grand River, shall be enjoined and prohibited from selling cigarettes to consumers within the State of Idaho, whether directly or through a distributor, retailer or similar intermediary or intermediaries until Defendant establishes a qualified escrow fund as defined by Idaho code § 39-7802(f) of the Act and certifies their compliance to the Attorney General.

4. Plaintiff, State of Idaho, shall be awarded judgment against Defendant, Grand River, for civil penalties in the amount of \$145,304.61.

5. Plaintiff, State of Idaho, shall be awarded judgment against Defendant, Grand River, for attorney fees and costs in the amount of \$490.00.

DATED this 4 day of September, 2002.

**MICHAEL McLAUGHLIN**  
DISTRICT JUDGE

STATE OF IDAHO }  
COUNTY OF ADA } ss.  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed by official  
seal this 22nd day  
of February, 2003  
J. DAVID NAVARRO, Clerk  
By Thomas, Deputy

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of September, 2002, I caused to be served a true and correct copy of the foregoing by placing a copy thereof in the United States Mail, postage prepaid, addressed to:

Brett T. DeLange  
Deputy Attorney General  
Office of the Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010

Grand River Enterprises  
6 Nations Ltd.  
Box 750  
Ohseweken, Ontario NOA 1MO  
CANADA

CLERK OF THE DISTRICT COURT

By: KRISTIN M. BROWN  
Deputy Clerk

**SEAL**



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

June 5, 2008

**VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED**

Arthur Montour, Jr.  
Native Wholesale Supply Company  
10955 Logan Road  
Perrysburg, NY 14129

P.O. Box 214  
Gowanda, NY 14070

*Re: Notice of Apparent Liability Under Idaho law—Violations of Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act)*

Dear Mr. Montour:

It has come to our attention that Seneca brand cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. (Grand River Enterprises), imported by your company and held at the Nevada International Trade Corporation, Foreign Trade Zone #89, in Las Vegas, Nevada, have been sold and shipped at your company's direction from that location to at least one purchaser in the State of Idaho, namely War Path, North 165 Hwy 95, Plummer, ID 83851.

Idaho Code § 39-8403(3) of the Complementary Act makes it unlawful for any person to sell, offer for sale, possess, acquire, hold, own, import, or cause to import for sale or distribution in Idaho cigarettes of a tobacco product manufacturer or brand family not on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho's Directory). Neither Seneca brand cigarettes nor Grand River Enterprises are listed on Idaho's Directory. Additionally, sale in Idaho of cigarettes manufactured by Grand River Enterprises, including Seneca, have been enjoined by order dated September 5, 2002, of the Fourth Judicial Court, in and for the County of Ada, State of Idaho, in the case entitled State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises, Case No. CV OC 0205249M.

**EXHIBIT**

B

Consumer Protection Division  
Len B. Jordan Building, Lower Level, P.O. Box 83720, Boise, Idaho 83720-0010  
Telephone: (208) 334-2424, FAX: (208) 334-4151  
(800) 432-3545, Toll Free in Idaho; TDD Accessible

000208  
IDAG150677

**U.S. Postal Service**  
**CERTIFIED MAIL RECEIPT**  
*(Domestic Mail Only; No Insurance Coverage Provided)*

7000 1530 0000 9416 9180

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
<b>Total Postage &amp; Fees</b>	<b>\$</b>

Postmark  
Here

6/5/04

**Sent To**

NWSC

Street, Apt. No.; or P.O. Box No.

POB 214

City, State, ZIP+ 4

PS Form 3800, May 2000

See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 P.O. Box 214  
 Gowanda NY 14070

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes ☒ No  
 If YES, enter delivery address below

3. Service Type  
☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number  
 (Transfer from service label)

7000 1530 0000 9416 9180

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

IDAG150811 000209

**U.S. Postal Service**  
**CERTIFIED MAIL RECEIPT**  
*(Domestic Mail Only; No Insurance Coverage Provided)*

OFFICIAL USE

7000 1530 0000 9416 9173

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

6/5/08  
 Postmark  
 Here

**Sent To** NWSC  
**Street, Apt. No.; or PO Box No.** 10955 Logan Rd  
**City, State, ZIP+ 4**

PS Form 3800, May 2000

See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 10955 Logan Road  
 Perrysburg NY 14129

**COMPLETE THIS SECTION ON DELIVERY**

**A. Received by (Please Print Clearly)** Tricia Thomas **B. Date of Delivery** 6/12/08

**C. Signature** Tricia Thomas ☒ Agent ☐ Addressee

**D. Is delivery address different from item 1?** ☐ Yes ☐ No  
 If YES, enter delivery address below:

**3. Service Type**  
☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

**4. Restricted Delivery? (Extra Fee)** ☐ Yes

**2. Article Number (Copy from service label)**

7000 1530 0000 9416 9173

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

IDAG150210

[Track & Confirm](#)[FAQs](#)

## Track & Confirm

### Search Results

Label/Receipt Number: 7000 1530 0000 9416 9180

Detailed Results:

- Delivered, June 09, 2008, 1:03 pm, GOWANDA, NY 14070
- Notice Left, June 09, 2008, 8:33 am, GOWANDA, NY 14070
- Arrival at Unit, June 09, 2008, 8:33 am, GOWANDA, NY 14070

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### Track & Confirm

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STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

May 22, 2008

**VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED**

Bob Anderlik  
Vice President, Client Services  
Nevada International Trade Corporation  
Foreign Trade Zone # 89  
6620 Escondido Street, Suite E  
Las Vegas, NV 89119

*RE: Subpoena and Investigative Demand; Native Wholesale Supply Company*

Dear Mr. Anderlik:

The Idaho Attorney General is charged with enforcing Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act).<sup>1</sup> We have commenced an investigation to determine whether Native Wholesale Supply Company violates or has violated the Complementary Act. The Complementary Act prohibits, in part, the sale of cigarettes into Idaho that are not certified for sale by the Idaho Attorney General, pursuant to the provisions of the Complementary Act.

The basis for our investigation is that we have reason to believe that Native Wholesale Supply Company is or has violated the Complementary Act by shipping, selling, transporting, exporting, importing, or otherwise distributing cigarettes to location(s) within the State of Idaho during the period May 22, 2004 to today. We have reason to believe that it has shipped such cigarettes from Foreign Trade Zone #89. Our investigation may reveal other acts and practices in violation of applicable provisions of Idaho law.

The Complementary Act provides that violations of its terms are deemed violations also of the Idaho Consumer Protection Act (ICPA).<sup>2</sup> Pursuant to the authority granted to the Attorney General by the ICPA, Idaho Code §§ 48-611 and 48-612, we are issuing a Subpoena and Investigative Demand (Investigative Demand), to obtain documents and information as set forth

<sup>1</sup> The Complementary Act, as amended, is codified at Title 39, Chapter 84, Idaho Code.

<sup>2</sup> The ICPA, as amended, is codified at Title 48, Chapter 6 Idaho Code.

**EXHIBIT**

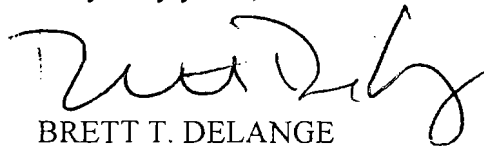
C

in the enclosed Investigative Demand. Section 48-611 of the ICPA is the section that authorizes the Idaho Attorney General to issue and serve civil investigative demands "upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation," and Section 48-612 is the section that authorizes the Attorney General to issue and serve subpoenas "to any person . . . in aid of any investigation or inquiry."

Because the Office of the Idaho Attorney General is conducting an investigation of Native Wholesale Supply Company for violations of Idaho law, we respectfully request that Nevada International Trade Corporation preserve all records that relate to or are the subject of this inquiry until this matter is fully disposed of or until the Attorney General agrees or a court orders that retention is no longer necessary. We appreciate your cooperation in this regard.

Thank you for your attention to this matter. Idaho Code Section 48-611 of the ICPA grants a person twenty (20) days from the date he receives an Investigative Demand in which to respond. If you have questions or comments, about this letter or the accompanying Investigative Demand, please contact me. My direct phone line is 208-334-4114.

Very truly yours,



BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

Enclosure(s)

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DELANGE (ISB NO. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building, Lower Level  
650 W. State Street  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**IN THE OFFICE OF THE IDAHO ATTORNEY GENERAL**

---

**SUBPOENA AND INVESTIGATIVE DEMAND**

---

**THE IDAHO ATTORNEY GENERAL SENDS GREETINGS TO:**

**Nevada International Trade Corporation  
Foreign Trade Zone # 89  
6620 Escondido Street, Suite E  
Las Vegas, NV 89119**

The Attorney General of the State of Idaho (Attorney General), pursuant to authority conferred upon him by Idaho Code Section 39-8406(5) of the Idaho Tobacco Master Settlement Agreement Complementary Act and Idaho Code Sections 48-611 and 48-612 of the Idaho Consumer Protection Act, hereby issues this subpoena and investigative demand in order to obtain information, documentary material, and physical evidence in your custody and/or control which is requested in the attached "Information Requested" pages, which are incorporated herein as if set out in full.

**INSTRUCTIONS**

The information and material requested must be received by the Attorney General's Consumer Protection Division on or before twenty (20) days after your receipt of this Subpoena and Investigative Demand (Demand). For failure to comply with this Demand, an action can be filed in the District Court of the Fourth Judicial District of the State of Idaho, pursuant to Title 48, chapter 6, Idaho Code, to compel the production of such information and material and for other relief.

In answering this Demand, you must furnish all information that is available to you or subject to your reasonable inquiry, including information in the possession of your attorneys,

accountants, advisors, or other persons directly or indirectly employed by or connected with you or subject to your control.

In answering this Demand, you must diligently search your records and other papers and materials in your possession or available to you or your representatives. If a specific question has subparts, answer each part separately and fully. If you cannot answer this Demand fully, answer to the extent possible, specify the reason for your inability to answer the remainder, and provide whatever information and knowledge you have regarding the unanswered portion. With respect to each question, in addition to supplying the information asked for and identifying the specific documents referred to, identify and describe all documents to which you refer in preparing your answers.

Concerning documents which you are being requested to produce, as an alternative, accurate, legible, and complete copies may be attached to your answers and responses and served within the same 20-day period.

Your response to the request for documents and other tangible or physical things must be based not only on documents and things in your personal possession, but also on any and all documents and things available to you, including those in the possession of any of your agents, attorneys, or employees.

Original documents utilized in support of your response to the information requests should be preserved for identification and review at a later date.

This Demand is issued without knowledge of what documents you have or the form in which they are kept and filed. Therefore, after you have reviewed this Demand and determined what documents are available, the attorneys for the Consumer Protection Division are prepared to discuss possible modifications that will avoid unnecessary burdens. Such contact should be made within ten (10) days of the date this Demand was issued. However, no agreements, understandings, or stipulations by the Attorney General, or any of his representatives, which modify, limit, or in any other way alter the written demands of this Demand shall be valid or binding on the Attorney General unless confirmed or acknowledged in writing by the Attorney General or one of his duly authorized representatives.

### DEFINITIONS

Unless otherwise indicated, the following definitions shall be applicable to this Subpoena and Demand:

1. **"And"** and **"or"** are terms of inclusion and not of exclusion and shall be construed so as to bring within the scope of this Demand and document or information that might otherwise be construed to be outside its scope. For ease of readability neither word will be bolded as follows.
2. **"Document"** and **"documents"** mean all written, recorded, or graphic matters, however produced or reproduced, pertaining in any way to the subject matter of

this action. This definition includes, but is not limited to any and all originals, copies, or drafts or any and all the following: records, notes, summaries, schedules, contracts, agreements, drawings, sketches, invoices, orders, checks, policies, acknowledgments, diaries, reports, forecasts, appraisals, memoranda, telephone logs, letters, telegrams, telexes, cables, tapes, transcripts, recordings, photographs, pictures, films, computer programs, or other graphics, symbolics, and recorded or written materials of any nature whatsoever. Any document that contains a comment, notation, addition, insertion, or marking of any kind that is not part of another document is to be considered as a separate document.

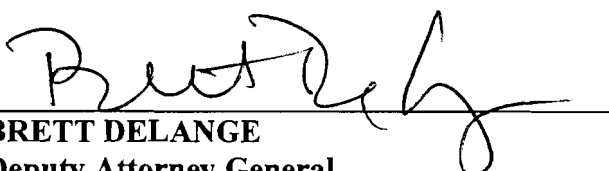
2. **"Cigarette"** means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one (1) individual "cigarette."
3. Where asked to **"identify"** a **person** who is a natural born individual, or where your answer refers to such a person, please state his or her name, last known address, occupation, last known business address, and last known business telephone number.
4. Where asked to **"identify"** a **person** who is not a natural born individual, please give its correct name; indicate, if it is a business entity, whether it is a corporation, partnership, sole proprietorship, or unincorporated association, if **you** know, and give the address and telephone number of the entity's principal office.
5. **"Isleta Native Wholesale Supply Company"** means that **person** that is a tobacco wholesaler. Upon information and belief of the Office of the Idaho Attorney General, Isleta Native Wholesale Supply Company is or has been located at 3513 Highway 47, Bosque Farms, New Mexico.
6. **"Person"** means and includes a natural person, partnership, firm, or corporation or any other kind of business or legal entity, and its agents or employees.
7. **"Native Wholesale Supply Company"** means that **person** that is a tobacco wholesaler. Upon information and belief of the Office of the Idaho Attorney General, Native Wholesale Supply Company is or has been located at 11037 Old

Logan Road, Perrysburg, New York, 10955 Logan Road, Perrysburg, NY, and/or  
3513 Highway 47, Bosque Farms, New Mexico.

8. **"You"** or **"your"** means Nevada International Trade Corporation to whom this Demand is addressed and includes any merged or acquired predecessors, successors, divisions, parents, subsidiaries, affiliates, and any other organization in which you have a management or controlling interest, if any.

Witness my hand this 22nd day of May, 2008.

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By:   
**BRETT DELANGE  
Deputy Attorney General  
Consumer Protection Division**

**INFORMATION REQUESTED PURSUANT TO SUBPOENA AND  
INVESTIGATIVE DEMAND ISSUED TO:**

**Nevada International Trade Corporation  
Foreign Trade Zone # 89  
6620 Escondido Street, Suite E  
Las Vegas, NV 89119**

---

**INFORMATION REQUESTED**

You are requested to provide the following information and documents:

1. Please provide copies of any and all **documents** received, issued, or provided to or from **Native Wholesale Supply Company** pertaining to **cigarettes** shipped, sold, transported, exported or otherwise distributed to location(s) within the State of Idaho during the period May 22, 2004 to the date of service of this Demand.
2. Please provide copies of any and all shipping, import, and export **documents** related to **Native Wholesale Supply Company** pertaining to **cigarettes** shipped, sold, transported, exported or otherwise distributed to location(s) within the State of Idaho during the period May 22, 2004 to the date of service of this Demand, including, but not limited to:
  - (a) any and all Entry/Immediate Delivery forms;
  - (b) any and all Tally Out Warehouse Release forms;
  - (c) any and all Nevada International Trade Zone Warehouse Withdrawal forms;
  - (d) any and all Conway Freight Straight Bills of Lading; and
  - (e) any and all invoices and bills of lading
3. Please provide copies of any and all shipping, import and export **documents** related to **Isleta Wholesale Supply**, or any other **person** besides **Native Wholesale Supply Company**, pertaining to **cigarettes** shipped, sold, transported, exported or otherwise distributed to location(s) within the State of Idaho during the period May 22, 2004 to the date of service of this Demand, including, but not limited to:
  - (a) any and all Entry/Immediate Delivery forms;
  - (b) any and all Tally Out Warehouse Release forms;

(c) any and all Nevada International Trade Zone Warehouse Withdrawal forms;

(d) any and all Conway Freight Straight Bills of Lading; and

(e) any and all invoices and bills of lading

4. Please **identify** each **person** who assisted **you** in the answering of this Demand.



7006 3450 0001 0774 1122

<b>U.S. Postal Service™</b> <b>CERTIFIED MAIL™ RECEIPT</b> (Domestic Mail Only; No Insurance Coverage Provided)	
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<b>OFFICIAL USE</b>	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
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Total Postage & Fees	\$
Postmark Here 5/22/08	
Sent To <u>LU FTZ #89</u> Street, Apt. No., or PO Box No. City, State, ZIP+4	
PS Form 3800, August 2006 See Reverse for Instructions	

<b>SENDER: COMPLETE THIS SECTION</b>	<b>COMPLETE THIS SECTION ON DELIVERY</b>
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature X <u>[Signature]</u> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee
1. Article Addressed to: Bob Anderlik Vice President, Client Services NV Int'l Trade Corporation Foreign Trade Zone #89 6620 Escondido St Suite E Las Vegas NV 89119	B. Received by (Printed Name) <u>ROBERT ANDERLIK</u> C. Date of Delivery <u>5-17-08</u> D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:
2. Article Number (Transfer from service label)	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. 4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes
7006 3450 0001 0774 1122	



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

September 17, 2008

*Via Certified Mail, Return Receipt Requested*

Daniel Egeler  
Assistant General Counsel  
Con-Way, Inc.  
2211 Old Earhart Road  
Ann Harbor MI 48105

*RE: Subpoena and Investigative Demand; Native Wholesale Supply Company*

Dear Mr. Egeler:

Thank you for your letter of September 11, 2008. In accordance with your request therein, and pursuant to the authority granted to the Attorney General by the Idaho Consumer Protection Act<sup>1</sup> (ICPA), Idaho Code §§ 48-611 and 48-612, we have enclosed a Subpoena and Investigative Demand (Investigative Demand) to obtain documents and information as set forth in the enclosed Investigative Demand. Section 48-611 of the ICPA is the section that authorizes the Idaho Attorney General to issue and serve civil investigative demands "upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation," and Section 48-612 is the section that authorizes the Attorney General to issue and serve subpoenas "to any person . . . in aid of any investigation or inquiry."

We have commenced an investigation to determine whether Native Wholesale Supply Company is or has violated Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act).<sup>2</sup> The Complementary Act prohibits, in part, the sale of cigarettes into Idaho that are not certified for sale by the Idaho Attorney General, pursuant to the provisions of the Complementary Act. The Complementary Act also makes a violation of it a violation of the Consumer Protection Act.

<sup>1</sup> The ICPA, as amended, is codified at Title 48, Chapter 6 Idaho Code.

<sup>2</sup> The Complementary Act, as amended, is codified at Title 39, Chapter 84, Idaho Code.

Consumer Protection Division

Len B. Jordan Building, Lower Level, P.O. Box 83720, Boise, Idaho 83720-0010

Telephone: (208) 334-2424, FAX: (208) 334-4151  
(800) 432-3545, Toll Free in Idaho; TDD Accessible

000221

IDAG152532



The basis for our investigation is that we have reason to believe that Native Wholesale Supply Company is or has violated the Complementary Act by shipping, selling, transporting, exporting, importing, or otherwise distributing cigarettes to location(s) within the State of Idaho during the period May 22, 2004 to today. We have reason to believe that it has shipped such cigarettes from the Nevada International Trade Corp., Foreign Trade Zone #89, in Las Vegas, Nevada, to War Path Smoke Shop in Plummer, Idaho. Identifying information for the shipper, seller and consignee can be found within the Investigative Demand. Our investigation may reveal other acts and practices in violation of applicable provisions of Idaho law.

Because the Office of the Idaho Attorney General is conducting an investigation of Native Wholesale Supply Company for violations of Idaho law, we respectfully request that Con-way Freight preserve all records that relate to or are the subject of this inquiry until this matter is fully disposed of or until the Attorney General agrees or a court orders that retention is no longer necessary. We appreciate your cooperation in this regard.

Thank you for your attention to this matter. Idaho Code Section 48-611 of the ICPA grants a person twenty (20) days from the date he receives an Investigative Demand in which to respond. If you have questions or comments, about this letter or the accompanying Investigative Demand, please contact me. My direct phone line is 208-334-4114.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brett T. Delange", with a stylized flourish at the end.

BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

Enclosure

000222

IDAG152533

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DELANGE (ISB NO. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 West Jefferson Street, 2nd Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**IN THE OFFICE OF THE IDAHO ATTORNEY GENERAL**

---

**SUBPOENA AND INVESTIGATIVE DEMAND**

---

**THE IDAHO ATTORNEY GENERAL SENDS GREETINGS TO:**

**Con-way Freight  
2211 Old Earhart Road  
Ann Arbor MI 48105-2751**

The Attorney General of the State of Idaho (Attorney General), pursuant to authority conferred upon him by Idaho Code Section 39-8406(5) of the Idaho Tobacco Master Settlement Agreement Complementary Act and Idaho Code Sections 48-611 and 48-612 of the Idaho Consumer Protection Act, hereby issues this subpoena and investigative demand in order to obtain information, documentary material, and physical evidence in your custody and/or control which is requested in the attached "Information Requested" pages, which are incorporated herein as if set out in full.

**INSTRUCTIONS**

The information and material requested must be received by the Attorney General's Consumer Protection Division on or before twenty (20) days after your receipt of this Subpoena and Investigative Demand (Demand). For failure to comply with this Demand, an action can be filed in the District Court of the Fourth Judicial District of the State of Idaho, pursuant to Title 48, chapter 6, Idaho Code, to compel the production of such information and material and for other relief.

In answering this Demand, you must furnish all information that is available to you or subject to your reasonable inquiry, including information in the possession of your attorneys, accountants, advisors, or other persons directly or indirectly employed by or connected with you or subject to your control.

In answering this Demand, you must diligently search your records and other papers and materials in your possession or available to you or your representatives. If a specific question has subparts, answer each part separately and fully. If you cannot answer this Demand fully, answer to the extent possible, specify the reason for your inability to answer the remainder, and provide whatever information and knowledge you have regarding the unanswered portion. With respect to each question, in addition to supplying the information asked for and identifying the specific documents referred to, identify and describe all documents to which you refer in preparing your answers.

Concerning documents which you are being requested to produce, as an alternative, accurate, legible, and complete copies may be attached to your answers and responses and served within the same 20-day period.

Your response to the request for documents and other tangible or physical things must be based not only on documents and things in your personal possession, but also on any and all documents and things available to you, including those in the possession of any of your agents, attorneys, or employees.

Original documents utilized in support of your response to the information requests should be preserved for identification and review at a later date.

This Demand is issued without knowledge of what documents you have or the form in which they are kept and filed. Therefore, after you have reviewed this Demand and determined what documents are available, the attorneys for the Consumer Protection Division are prepared to discuss possible modifications that will avoid unnecessary burdens. Such contact should be made within ten (10) days of the date this Demand was issued. However, no agreements, understandings, or stipulations by the Attorney General, or any of his representatives, which modify, limit, or in any other way alter the written demands of this Demand shall be valid or binding on the Attorney General unless confirmed or acknowledged in writing by the Attorney General or one of his duly authorized representatives.

### DEFINITIONS

Unless otherwise indicated, the following definitions shall be applicable to this Subpoena and Demand:

1. **"And"** and **"or"** are terms of inclusion and not of exclusion and shall be construed so as to bring within the scope of this Demand and document or information that might otherwise be construed to be outside its scope. For ease of readability neither word will be bolded as follows.
2. **"Document"** and **"documents"** mean all written, recorded, or graphic matters, however produced or reproduced, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to any and all originals, copies, or drafts or any and all the following: records, notes, summaries, schedules, contracts, agreements, drawings, sketches, invoices, orders, checks,

policies, acknowledgments, diaries, reports, forecasts, appraisals, memoranda, telephone logs, letters, telegrams, telexes, cables, tapes, transcripts, recordings, photographs, pictures, films, computer programs, or other graphics, symbolics, and recorded or written materials of any nature whatsoever. Any document that contains a comment, notation, addition, insertion, or marking of any kind that is not part of another document is to be considered as a separate document.

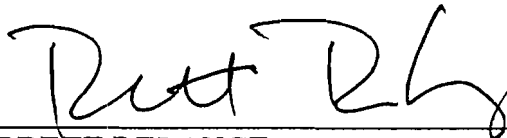
2. **"Cigarette"** means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one (1) individual "cigarette."
3. Where asked to **"identify"** a **person** who is a natural born individual, or where your answer refers to such a person, please state his or her name, last known address, occupation, last known business address, and last known business telephone number.
4. Where asked to **"identify"** a **person** who is not a natural born individual, please give its correct name; indicate, if it is a business entity, whether it is a corporation, partnership, sole proprietorship, or unincorporated association, if **you** know, and give the address and telephone number of the entity's principal office.
5. **"Isleta Native Wholesale Supply Company"** means that **person** that is a tobacco wholesaler. Upon information and belief of the Office of the Idaho Attorney General, Isleta Native Wholesale Supply Company is or has been located at 3513 Highway 47, Bosque Farms, New Mexico.
6. **"Person"** means and includes a natural person, partnership, firm, or corporation or any other kind of business or legal entity, and its agents or employees.
7. **"Native Wholesale Supply Company"** means that **person** that is a tobacco wholesaler. Upon information and belief of the Office of the Idaho Attorney General, Native Wholesale Supply Company is or has been located at 11037 Old Logan Road, Perrysburg, New York, 10955 Logan Road, Perrysburg, New York, and/or 3513 Highway 47, Bosque Farms, New Mexico.

8. **"You"** or **"your"** means Con-way, Inc., and Con-way Freight, to whom this Demand is addressed and includes any merged or acquired predecessors, successors, divisions, parents, subsidiaries, affiliates, and any other organization in which you have a management or controlling interest, if any.
9. **"Seller"** means Native Wholesale Supply, as that term is defined in paragraph 7 above.
10. **"Shipper"** means the Nevada International Trade Corp, Foreign Trade Zone #89, located at 6620 Escondido Street, Suite E, Las Vegas, Nevada.
11. **"Consignee"** and **"War Path"** means that **person** that is a tobacco retailer. Upon information and belief of the Office of the Idaho Attorney General, War Path, also known as Warpath Smoke Shop, is or has been located at North 165 Highway 95, Plummer, Idaho, and/or 396070 Highway 95, Plummer, Idaho.

Witness my hand this 17th day of September, 2008.

**LAWRENCE G. WASDEN**  
**ATTORNEY GENERAL**  
**STATE OF IDAHO**

By: \_\_\_\_\_



**BRETT DELANGE**  
**Deputy Attorney General**  
**Consumer Protection Division**

**INFORMATION REQUESTED PURSUANT TO SUBPOENA AND  
INVESTIGATIVE DEMAND ISSUED TO:**

**Con-way Freight  
2211 Old Earhart Road  
Ann Arbor MI 48105-2751**

---

**INFORMATION REQUESTED**

You are requested to provide the following information and documents:

1. Please provide copies of any and all **documents** received, issued, or provided to or from **Native Wholesale Supply Company, Nevada International Trade Corp., and/or War Path** pertaining to **cigarettes** shipped, sold, transported, exported or otherwise distributed to location(s) within the State of Idaho during the period September 2006 to the date of service of this Demand.
2. Please provide copies of any and all shipping, import, and export **documents** related to **Native Wholesale Supply Company, Nevada International Trade Corp., and/or War Path** pertaining to **cigarettes** shipped, sold, transported, exported or otherwise distributed to location(s) within the State of Idaho during the period September 2006 to the date of service of this Demand, including, but not limited to:
  - (a) any and all U.S. Department of Homeland Security Entry/Immediate Delivery forms;
  - (b) any and all Tally Out Warehouse Release forms;
  - (c) any and all Nevada International Trade Zone Warehouse Withdrawal forms;
  - (d) any and all Con-way Freight Straight Bills of Lading; and
  - (e) any and all invoices and bills of lading.
3. Please provide copies of any and all shipping, import and export **documents** related to **Isleta Wholesale Supply**, or any other **person** besides **Native Wholesale Supply Company**, pertaining to **cigarettes** shipped, sold, transported, exported or otherwise distributed to location(s) within the State of Idaho during the period September 2006 to the date of service of this Demand, including, but not limited to:
  - (a) any and all u.s. Department of Homeland Security Entry/Immediate Delivery forms;
  - (b) any and all Tally Out Warehouse Release forms;



(c) any and all Nevada International Trade Zone Warehouse Withdrawal forms;

(d) any and all Con-way Freight Straight Bills of Lading; and

(e) any and all invoices and bills of lading

4. Please **identify** each **person** who assisted **you** in the answering of this Demand.

7006 3450 0001 0773 9945

**U.S. Postal Service™**  
**CERTIFIED MAIL™ RECEIPT**  
*(Domestic Mail Only; No Insurance Coverage Provided)*

For delivery information visit our website at [www.usps.com](http://www.usps.com)®

**OFFICIAL USE**

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark  
Here

9/17/08

Sent To	Con-way Freight
Street, Apt. No., or PO Box No.	
City, State, ZIP+4	

PS Form 3800, August 2006

See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Daniel Egeler  
 Con-Way Freight  
 2211 Old Earhart Rd  
 Ann Arbor MI  
 48105-2751

2. A 7006 3450 0001 0773 9945

**COMPLETE THIS SECTION ON DELIVERY**

A. Receiver (Please Print Clearly) B. Date of Delivery

C. Signature

☒ Agent  
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes  
 If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

000229  
 IDAG152540



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

January 6, 2009

**VIA HAND DELIVERY**

Connie Mahoney  
Registered Agent  
Warpath, Inc.  
396070 Hwy 95  
Plummer, ID 83851

*RE: Subpoena and Investigative Demand; Native Wholesale Supply Company*

Dear Ms. Mahoney:

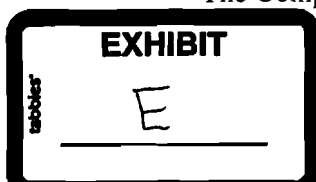
Pursuant to the authority granted to the Attorney General by the Idaho Consumer Protection Act<sup>1</sup> (ICPA), specifically, Idaho Code Sections 48-611 and 48-612, we have enclosed a Subpoena and Investigative Demand (Investigative Demand) to obtain documents and information as set forth in the enclosed Investigative Demand. Section 48-611 of the ICPA is the section that authorizes the Attorney General to issue and serve civil investigative demands "upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation," and Section 48-612 is the section that authorizes the Attorney General to issue and serve subpoenas "to any person . . . in aid of any investigation or inquiry."

The purpose of the Investigative Demand is that we have reason to believe that Native Wholesale Supply Company (Native Wholesale) is violating or has violated Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act).<sup>2</sup> The Complementary Act prohibits, in part, the sale of cigarettes into Idaho that are not certified for sale by the Idaho Attorney General, pursuant to the provisions of the Complementary Act. The Complementary Act also makes a violation of it a violation of the ICPA.

The basis for our reason to believe that Native Wholesale is or has violated the Complementary Act is that it has or is shipping, selling, transporting, exporting, importing, or

<sup>1</sup> The ICPA, as amended, is codified at Title 48, Chapter 6 Idaho Code.

<sup>2</sup> The Complementary Act, as amended, is codified at Title 39, Chapter 84, Idaho Code.



otherwise distributing cigarettes not certified for sale by the Attorney General to location(s) within the State of Idaho during the period May 22, 2004 to today. It is our belief that Warpath, Inc., is one such location and that it has relevant documents and information related to Native Wholesale's cigarette sales.

In conjunction with the service of the enclosed Investigative Demand, we respectfully request that Warpath, Inc., preserve all records that relate to or are the subject of this Investigative Demand until this matter is fully disposed of or until the Attorney General agrees or a court orders that retention is no longer necessary. We appreciate your cooperation in this regard.

Thank you for your attention to this matter. Idaho Code Section 48-611 of the ICPA grants a person twenty (20) days from the date the Investigative Demand is received in which to respond. If you have questions or comments about this letter or the accompanying Investigative Demand, please contact me. My direct phone line is 208-334-4114.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brett T. Delange", with a stylized flourish at the end.

BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

Enclosure

---

State of Idaho v. Native Wholesale  
Supply Company  
Case No. CV OVC 0815228

*Shipment Records from Nevada FTZ,  
Con-Way Freight, and Warpath, Inc.*

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DELANGE (ISB NO. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 West Jefferson Street, 2nd Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**IN THE OFFICE OF THE IDAHO ATTORNEY GENERAL**

---

**SUBPOENA AND INVESTIGATIVE DEMAND**

---

**THE IDAHO ATTORNEY GENERAL SENDS GREETINGS TO:**

**Warpath, Inc.  
396070 Hwy 95  
Plummer ID 83851**

The Attorney General of the State of Idaho (Attorney General), pursuant to authority conferred upon him by Idaho Code Section 39-8406(5) of the Idaho Tobacco Master Settlement Agreement Complementary Act and Idaho Code Sections 48-611 and 48-612 of the Idaho Consumer Protection Act, hereby issues this subpoena and investigative demand in order to obtain information, documentary material, and physical evidence in your custody and/or control which is requested in the attached "Information Requested" pages, which are incorporated herein as if set out in full.

**INSTRUCTIONS**

The information and material requested must be received by the Attorney General's Consumer Protection Division on or before twenty (20) days after your receipt of this Subpoena and Investigative Demand (Demand). For failure to comply with this Demand, an action can be filed in the District Court of a Judicial District of the State of Idaho, pursuant to Title 48, Chapter 6, Idaho Code, to compel the production of such information and material and for other relief.

In answering this Demand, you must furnish all information that is available to you or subject to your reasonable inquiry, including information in the possession of your attorneys, accountants, advisors, or other persons directly or indirectly employed by or connected with you or subject to your control.

In answering this Demand, you must diligently search your records and other papers and materials in your possession or available to you or your representatives. If a specific question has subparts, answer each part separately and fully. If you cannot answer this Demand fully, answer to the extent possible, specify the reason for your inability to answer the remainder, and provide whatever information and knowledge you have regarding the unanswered portion. With respect to each question, in addition to supplying the information asked for and identifying the specific documents referred to, identify and describe all documents to which you refer in preparing your answers.

Concerning documents which you are being requested to produce, as an alternative, accurate, legible, and complete copies may be attached to your answers and responses and served within the same 20-day period. An equally acceptable alternative is for you to scan accurate, legible, and complete copies of the materials you are requested to produce onto CD in Adobe Acrobat® PDF format and served within the same 30-day period.

Your response to the request for documents and other tangible or physical things must be based not only on documents and things in your personal possession, but also on any and all documents and things available to you, including those in the possession of any of your agents, attorneys, or employees.

Original documents utilized in support of your response to the information requests should be preserved for identification and review at a later date.

This Demand is issued without knowledge of what documents you have or the form in which they are kept and filed. Therefore, after you have reviewed this Demand and determined what documents are available, the attorneys for the Consumer Protection Division are prepared to discuss possible modifications that will avoid unnecessary burdens. Such contact should be made within ten (10) days of the date this Demand was issued. However, no agreements, understandings, or stipulations by the Attorney General, or any of his representatives, which modify, limit, or in any other way alter the written demands of this Demand shall be valid or binding on the Attorney General unless confirmed or acknowledged in writing by the Attorney General or one of his duly authorized representatives.

### **DEFINITIONS**

Unless otherwise indicated, the following definitions shall be applicable to this Subpoena and Demand:

1. **“And”** and **“or”** are terms of inclusion and not of exclusion and shall be construed so as to bring within the scope of this Demand and document or information that might otherwise be construed to be outside its scope. For ease of readability neither word will be bolded as follows.
2. **“Any”** means one or more.

3. **"APT Transportation, Inc."** means that person that is a common carrier. Upon information and belief of the Office of the Idaho Attorney General, APT Transportation, Inc. has a storage and distribution warehouse that is or has been located at 6215 McGill Avenue, Las Vegas, NV 89122.
4. **"Cigarette"** means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one (1) individual "cigarette."
5. **"Communication"** means any contact or act by which any information is transmitted or conveyed, and includes, without limitation, written contact by such means as e-mail, letters, invoices, sales receipts, bills, correspondence, memoranda, telegrams, telexes, telecopies, facsimile, or by any **document**, any oral contact such as face-to-face meetings or conversations, and telephone or any other electronically-transmitted communications or conversations.
6. **"Concerning," "relating to," or "related to,"** any subject matter means any **documents, communication**, or any other tangible item that discusses, describes, refers to, reflects, contains, analyzes, studies, reports on, comments on, evidences, constitutes, sets forth, considers, recommends, or pertains to, in whole or in part in any manner to the subject
7. **"Con-Way Freight, Inc."** means that person that is a common carrier. Upon information and belief of the Office of the Idaho Attorney General, Con-Way Freight, Inc. is or has been located at 2211 Old Earhart Road, Ann Arbor, Michigan.
8. **"Document"** and **"documents"** mean all written, recorded, or graphic matters, however produced or reproduced, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to any and all originals, copies, or drafts or any and all the following: records, notes, summaries, schedules, contracts, agreements, drawings, sketches, invoices, orders, checks, policies, acknowledgments, diaries, reports, forecasts, appraisals, memoranda, telephone logs, letters, telegrams, telexes, cables, tapes, transcripts, recordings, photographs, pictures, films, computer programs, or other graphics, symbolics,




and recorded or written materials of any nature whatsoever. Any document that contains a comment, notation, addition, insertion, or marking of any kind that is not part of another document is to be considered as a separate document.

9. **“Grand River Enterprises”** means that person that is the tobacco product manufacturer Grand River Enterprises Six Nations Ltd. Upon information and belief of the Office of the Idaho Attorney General, Grand River Enterprises is or has been located at 10955 Logan Road, Perrysburg, New York.
10. Where asked to **"identify" a person** who is a natural born individual, or where your answer refers to such a person, please state his or her name, last known address, occupation, last known business address, and last known business telephone number.
11. Where asked to **"identify" a person** who is not a natural born individual, please give its correct name; indicate, if it is a business entity, whether it is a corporation, partnership, sole proprietorship, or unincorporated association, if **you** know, and give the address and telephone number of the entity's principal office.
12. **“Isleta Native Wholesale Supply Company”** means that **person** that is a tobacco wholesaler. Upon information and belief of the Office of the Idaho Attorney General, Isleta Native Wholesale Supply Company is or has been located at 3513 Highway 47, Bosque Farms, New Mexico.
13. **“Lake Erie Tobacco”** means that **person** that is a tobacco wholesaler and/or manufacturer. Upon information and belief of the Office of the Idaho Attorney General, Lake Erie Tobacco is or has been located at 6558 Route 417, Kill Buck, New York.
14. **“Native Wholesale Supply Company”** means that **person** that is a tobacco wholesaler. Upon information and belief of the Office of the Idaho Attorney General, Native Wholesale Supply Company is or has been located at 11037 Old Logan Road, Perrysburg, New York, 10955 Logan Road, Perrysburg, New York, and/or 3513 Highway 47, Bosque Farms, New Mexico.
15. **“NITCO”** means the Nevada International Trade Corporation, also known as Foreign Trade Zone #89 and as the Southern Nevada Trade Zone. Upon information and belief of the Office of the Idaho Attorney General, NITCO is or has been located at 6620 Escondido Street, Suite E, Las Vegas, Nevada.
16. **"Person"** means and includes a natural person, partnership, firm, or corporation or any other kind of business or legal entity, and its agents or employees.

17. **"You"** or **"your"** means Warpath, Inc., Warpath Smoke Shop, and Warpath Trading Post, to whom this Demand is addressed and includes **any** merged or acquired predecessors, successors, divisions, parents, subsidiaries, affiliates, and **any** other organization in which you have a management or controlling interest, if any.

Witness my hand this 6<sup>th</sup> day of January, 2009.

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By:   
**BRETT DELANGE**  
**Deputy Attorney General**  
**Consumer Protection Division**

**INFORMATION REQUESTED PURSUANT TO SUBPOENA  
AND  
INVESTIGATIVE DEMAND ISSUED TO:**

**Warpath, Inc.  
396070 Hwy 95  
Plummer ID 83851**

---

**INFORMATION REQUESTED**

You are requested to provide the following information and documents:

1. Please provide copies of **any documents** received, issued, or provided to or from **Native Wholesale Supply Company** relating to shipments of Seneca and Opal brand **cigarettes** to **you** during the period May 22, 2004 to the date of service of this Demand, including, but not limited to, invoices, order forms, credit memos, checks or other evidence of payment, sales flyers and/or price lists.
2. Please provide copies of **any documents** received, issued, or provided to or from **any** other **person** besides **Native Wholesale Supply Company**, including **Lake Erie Tobacco, Isleta Native Wholesale Supply Company, NITCO, Con-Way Freight, Inc., and/or APT Transportation, Inc.,** relating to shipments of Seneca and Opal brand **cigarettes** to **you** during the period May 22, 2004 to the date of service of this Demand, including, but not limited to, invoices, order forms, credit memos, checks or other evidence of payment, sales flyers and/or price lists.
3. Please provide copies of **any** shipping, import and export **documents related to Native Wholesale Supply Company, concerning** shipments of Seneca and Opal brand **cigarettes** to **you** during the period May 22, 2004 to the date of service of this Demand, including, but not limited to:
  - (a) **any** U.S. Department of Homeland Security Entry/Immediate Delivery forms;
  - (b) **any** Tally Out Warehouse Release forms;
  - (c) **any** NITCO Withdrawal forms; and
  - (d) **any** invoices and bills of lading.
4. Please provide copies of any and all shipping, import and export **documents** received, issued, or provided to or from any other **person** besides **Native Wholesale Supply Company**, including **Lake Erie Tobacco, Isleta Native Wholesale Supply Company, NITCO, Con-Way Freight, Inc., and/or APT Transportation, Inc.,** concerning

shipments of Seneca and Opal brand **cigarettes** to **you** during the period May 22, 2004 to the date of service of this Demand, including, but not limited to:

- (a) **any** U.S. Department of Homeland Security Entry/Immediate Delivery forms;
  - (b) **any** Tally Out Warehouse Release forms;
  - (c) **any** **NITCO** Withdrawal forms; and
  - (d) **any** invoices and bills of lading.
5. To the extent not covered by the above requests, please provide **any communications** between **you** and **any** common or private carriers, including but not limited to **Con-Way Freight, Inc.**, and **APT, Transportation, Inc.**, relating to shipments or transportation of **cigarettes** sold, imported, or distributed by **Native Wholesale Supply Company** to **you**.
  6. Please provide **any documents and communications** between **you** and **Grand River Enterprises relating to cigarettes**.
  7. To the extent not covered by the above requests, please provide **any documents and communications** between **you** and **Native Wholesale Supply Company**.
  8. To the extent not covered by the above requests, please provide **any documents and communications** between **you** and **Lake Erie Tobacco**.
  9. Please **identify** each **person** who assisted **you** in the answering of this Demand.

RECEIVED

FEB 02 2009

OFFICE OF THE  
ATTORNEY GENERAL  
CONSUMER PROTECTION DIVISION

IN THE OFFICE OF THE IDAHO ATTORNEY GENERAL

To:

AFFIDAVIT OF SERVICE

Warpath, Inc.

COUNTY OF Shoshone )  
 )  
STATE OF Idaho )

COMES NOW, JAMES W. Calkins, being first duly sworn upon oath, and hereby deposes and says: That I am over the age of eighteen (18) years, and not a party to the action or related to any of the parties in the above entitled action. I received a true copy of the **Subpoena and Investigative Demand, Letter** and delivered the same upon **Warpath, Inc.** by delivering to and leaving with Connie Mahoney, Registered Agent, a person authorized to accept service on behalf of Warpath, Inc.

At: (Address) 851 "A" STREET

(City, State) PLUMMER, IDAHO

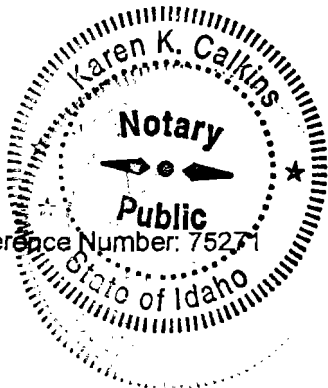
on the 24<sup>th</sup> day of JANUARY, 2009, at 1:09 o'clock P.m.

James W. Calkins  
PROCESS SERVER

Subscribed and sworn to before me on this 22 day of January, 2009.

Karen K. Calkins  
NOTARY PUBLIC  
Residing at Kingston  
Commission Expires: 7-8-2011

Our Reference Number: 75271



IDAG157767

000240

**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS	TOTAL UNITS	INVOICE AMT
2004	12-Feb	OPAL 30	40	240,000		
		SENECA 50	160	1,600,000		
		SENECA 60	95	1,140,000	2,980,000	\$109,105.00
2004	5-Apr	OPAL 30	45	270,000		
		SENECA 50	200	2,000,000		
		SENECA 60	100	1,200,000	3,470,000	\$119,002.50
2004	24-May	OPAL 30	30	180,000		
		SENECA 50	180	1,800,000		
		SENECA 60	105	1,260,000	3,240,000	\$118,260.00
2004	13-Jul	OPAL 30	55	330,000		
		SENECA 50	170	1,700,000		
		SENECA 60	90	1,080,000	3,110,000	\$114,222.50
2004	9-Aug	OPAL 30	0	0		
		SENECA 50	145	1,450,000		
		SENECA 60	155	1,860,000	3,310,000	\$119,987.50
2004	5-Oct	OPAL 30	40	240,000		
		SENECA 50	160	1,600,000		
		SENECA 60	140	1,680,000	3,520,000	\$128,680.00
2004	24-Nov	OPAL 30	25	150,000		
		SENECA 50	122	1,220,000		
		SENECA 60	100	1,200,000	2,570,000	\$93,837.50
2004	31-Dec	OPAL 30	5	30,000		
		SENECA 50	110	1,100,000		
		SENECA 60	110	1,320,000	2,450,000	\$88,947.50
<b>2004 TOTAL</b>					<b>24,650,000</b>	<b>\$892,042.50</b>



**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

<b>YEAR</b>	<b>MONTH</b>	<b>BRAND</b>	<b>CASES</b>	<b>UNITS</b>	<b>TOTAL UNITS</b>	<b>INVOICE AMT</b>
2005	11-Feb	OPAL 30	53	318,000		
		SENECA 50	0	0		
		SENECA 60	0	0	318,000	\$110,437.50
2005	3-Mar	OPAL 30	85	510,000		
		SENECA 50	0	0		
		SENECA 60	0	0	510,000	\$22,057.50
2005	11-Apr	OPAL 30	19	114,000		
		SENECA 50	70	700,000		
		SENECA 60	235	2,820,000	3,634,000	\$141,330.50
2005	26-May	OPAL 30	30	180,000		
		SENECA 50	35	350,000		
		SENECA 60	130	1,560,000	2,090,000	\$81,797.50
2005	29-Jun	OPAL 30	5	30,000		
		SENECA 50	61	610,000		
		SENECA 60	179	2,148,000	2,788,000	\$108,170.00
2005	1-Aug	OPAL 30	28	168,000		
		SENECA 50	50	500,000		
		SENECA 60	220	2,640,000	3,308,000	\$128,941.00
2005	14-Sep	OPAL 30	43	258,000		
		SENECA 50	145	1,450,000		
		SENECA 60	100	1,200,000	2,908,000	\$125,212.50
2005	14-Oct	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	20	240,000	240,000	\$9,300.00
2005	17-Oct	OPAL 30	50	300,000		
		SENECA 50	0	0		
		SENECA 60	230	2,760,000	3,060,000	\$120,075.00
2005	8-Dec	OPAL 30	55	330,000		
		SENECA 50	0	0		
		SENECA 60	185	2,220,000	2,550,000	\$100,462.50
<b>2005 TOTAL</b>					<b>21,406,000</b>	<b>\$947,784.00</b>

**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS	TOTAL UNITS	INVOICE AMT
2006	17-Jan	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	100	1,200,000	1,200,000	\$45,600.00
2006	19-Jan	OPAL 30	35	210,000		
		SENECA 50	0	0		
		SENECA 60	185	2,220,000	2,430,000	\$93,547.50
2006	22-Mar	OPAL 30	40	240,000		
		SENECA 50	0	0		
		SENECA 60	305	3,660,000	3,900,000	\$149,580.00
2006	22-May	OPAL 30	60	360,000		
		SENECA 50	0	0		
		SENECA 60	240	2,880,000	3,240,000	\$125,190.00
2006	1-Aug	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	230	2,760,000	2,760,000	\$104,880.00
2006	21-Aug	OPAL 30	75	450,000		
		SENECA 50	0	0		
		SENECA 60	0	0	450,000	\$19,687.50
2006	22-Aug	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	30	360,000	360,000	\$7,875.00
2006	13-Sep	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	275	3,300,000	3,300,000	\$125,400.00
2006	30-Oct	OPAL 30	45	270,000		
		SENECA 50	0	0		
		SENECA 60	145	1,740,000	2,010,000	\$77,932.50
2006	21-Dec	OPAL 30	40	240,000		
		SENECA 50	0	0		
		SENECA 60	245	2,940,000	3,180,000	\$122,220.00
2006 TOTAL					22,830,000	\$871,912.50



**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

<b>YEAR</b>	<b>MONTH</b>	<b>BRAND</b>	<b>CASES</b>	<b>UNITS</b>	<b>TOTAL UNITS</b>	<b>INVOICE AMT</b>
2007	5-Jan	OPAL 30	30	180,000		
		SENECA 50	0	0		
		SENECA 60	270	3,240,000	3,420,000	\$130,995.00
2007	6-Mar	OPAL 30	60	360,000		
		SENECA 50	0	0		
		SENECA 60	230	2,760,000	3,120,000	\$120,630.00
2007	12-Apr	OPAL 30	30	180,000		
		SENECA 50	0	0		
		SENECA 60	280	3,360,000	3,540,000	\$135,555.00
2007	5-Jun	OPAL 30	50	300,000		
		SENECA 50	0	0		
		SENECA 60	116	1,392,000	1,692,000	\$66,021.00
2007	28-Jun	OPAL 30	25	150,000		
		SENECA 50	0	0		
		SENECA 60	165	1,980,000	2,130,000	\$81,802.50
2007	27-Jul	OPAL 30	45	270,000		
		SENECA 50	0	0		
		SENECA 60	260	3,120,000	3,390,000	\$130,372.50
2007	31-Jul	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	10	120,000	120,000	\$4,410.00
2007	13-Sep	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	185	2,220,000	2,220,000	\$84,360.00
2007	2-Oct	OPAL 30	35	210,000		
		SENECA 50	0	0		
		SENECA 60	10	120,000	330,000	\$13,747.50
2007	22-Oct	OPAL 30	15	90,000		
		SENECA 50	0	0		
		SENECA 60	220	2,640,000	2,730,000	\$104,257.50
2007	6-Dec	OPAL 30	10	60,000		
		SENECA 50	0	0		
		SENECA 60	148	1,480,000		
		SENECA 120	35	210,000	1,750,000	\$79,300.50
<b>2007 TOTAL</b>					<b>24,442,000</b>	<b>\$951,451.50</b>

**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

YEAR	MONTH	BRAND	CASES	UNITS	TOTAL UNITS	INVOICE AMT
2008	12-Feb	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	89	1,068,000		
		SENECA 120	18	108,000	1,176,000	\$45,309.00
2008	11-Mar	OPAL 30	0	0		
		SENECA 50	0	0		
		SENECA 60	112	1,344,000		
		SENECA 120	0	0	1,344,000	\$51,072.00
2008	12-Mar	OPAL 30	20	120,000		
		SENECA 50	0	0		
		SENECA 60				
		SENECA 120	17	102,000	222,000	\$9,712.50
2008	8-Apr	OPAL 30	17	102,000		
		SENECA 50	0	0		
		SENECA 60	80	800,000		
		SENECA 120	0	0	902,000	\$40,942.50
2008	13-May	OPAL 30	16	96,000		
		SENECA 50	0	0		
		SENECA 60	130	1,300,000		
		SENECA 120	0	0	1,396,000	\$63,480.00
2008	13-Jun	OPAL 30	35	210,000		
		SENECA 50	0	0		
		SENECA 60	125	1,250,000		
		SENECA 120	0	0	1,460,000	\$66,187.50
2008	21-Jul	OPAL 30	49	294,000		
		SENECA 50	0	0		
		SENECA 60	134	1,340,000		
		SENECA 120	0	0	1,634,000	\$73,966.50
2008	19-Aug	OPAL 30	5	30,000		
		SENECA 50	0	0		
		SENECA 60	178	1,780,000		
		SENECA 120	0	0	1,810,000	\$93,310.50
2008	16-Sep	OPAL 30	31	186,000		
		SENECA 50	0	0		
		SENECA 60	237	2,370,000		
		SENECA 120	0	0	2,556,000	\$129,124.50
2008	6-Nov	OPAL 30	50	300,000		
		SENECA 50	0	0		
		SENECA 60	220	2,200,000		
		SENECA 120	0	0	2,500,000	\$128,145.00
<b>2008 TOTAL TO DATE</b>					<b>15,000,000</b>	<b>\$701,250.00</b>

**NATIVE WHOLESALE SUPPLY COMPANY SHIPMENT DATA**

<b>YEAR</b>	<b>MONTH</b>	<b>BRAND</b>	<b>CASES</b>	<b>UNITS</b>	<b>TOTAL UNITS</b>	<b>INVOICE AMT</b>
2009	12-Jan	OPAL 30	37	222,000		
		SENECA 50	0	0		
		SENECA 60	86	860,000		
		SENECA 120	0	0	1,082,000	\$53,908.50
2009	26-Jan	OPAL 30	21	126,000		
		SENECA 50	0	0		
		SENECA 60	130	1,300,000		
		SENECA 120	0	0	1,426,000	\$71,272.50
<b>2009 TOTAL TO DATE</b>					<b>2,508,000</b>	<b>\$125,181.00</b>
<b>TOTAL SHIPPED TO DATE</b>					<b>110,836,000</b>	<b>\$4,489,621.50</b>

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF  
CALIFORNIA ex rel. EDMUND G.  
BROWN, JR., ATTORNEY GENERAL,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and  
DOES 1 through 20,

Defendants.

)  
)  
)  
)  
)  
)  
) CASE NO.  
) 34-2008-00014593  
)  
)  
)  
)  
)  
)

DEPOSITION OF JO ANNE TORNBORG

LAS VEGAS, NEVADA

THURSDAY, NOVEMBER 20, 2008

**EXHIBIT**

tabbles

G

REPORTED BY: DANA TAVAGLIONE, RPR, CCR 841

LITi JOB NO. 1-99946

1 DEPOSITION OF JO ANNE TORNBERG,  
2 taken at 1640 West Alta Drive, Suite 4, Las Vegas,  
3 Nevada, on Thursday, November 20, 2008, at  
4 1:05 p.m., before Dana J. Tavaglione, Certified  
5 Court Reporter, in and for the State of Nevada.  
6

7 APPEARANCES:

8 For the Plaintiff:

9 STATE OF CALIFORNIA  
10 OFFICE OF THE ATTORNEY GENERAL  
BY: DENNIS ECKHART, ESQ.  
11 P.O. Box 944255  
Sacramento, California 92544  
12 916.323.3770  
dennis.eckhart@doj.ca.gov  
13

14 For Nevada International Trade Corporation:

15 POWELL LITIGATION GROUP  
BY: KEVIN R. HANSEN, ESQ.  
16 9525 Hillwood Drive  
Suite 100  
17 Las Vegas, Nevada 89134  
702.288.7200  
khansen@powellLit.com  
18

19 For the Defendants:  
(Not Present)  
20

21 FREDERICKS, PEEBLES & MORGAN  
BY: MICHAEL A. ROBINSON, ESQ.  
22 1001 Second Street  
Sacramento, California 95814  
23 916.441.2700  
24  
25

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1 LAS VEGAS, NEVADA; THURSDAY, NOVEMBER 20, 2008;

2 1:05 P.M.

3 -oOo-

4 (In an off-the-record discussion held  
5 prior to the commencement of the  
6 deposition proceedings, counsel agreed  
7 to waive the court reporter requirements  
8 under NRCP 30(B)(4).  
9

10 Thereupon --

11 JO ANNE TORNERG,  
12 having been first duly sworn to testify to the  
13 truth, was examined and testified as follows:  
14

15 EXAMINATION

16 BY MR. ECKHART:

17 Q. Ms. Tornberg, will you state your full name  
18 for the record, please.

19 A. Jo Anne Maude Tornberg.

20 Q. And has your attorney explained to you what  
21 the deposition is about today?

22 A. Yes.

23 Q. Have you ever had your deposition taken  
24 before?

25 A. Yes.



1 Q. So you have a general recollection of how  
2 these things work. The reporter to my right is  
3 taking down every word we say when we're on the  
4 record, and so you need to make audible responses to  
5 my questions.

6 A. Okay.

7 Q. And that's just so we have a clear record  
8 of what's going on today. I will be asking you a  
9 series of questions. I understand that you have  
10 produced some documents today, and I have had a  
11 chance to review those, and we'll be looking at  
12 those during the course of the deposition.

13 The court reporter has -- I believe we  
14 should make the first exhibit to the deposition,  
15 we'll mark the deposition notice as Plaintiff's  
16 Exhibit 1, please.

17 (Whereupon Plaintiff's Exhibit No. 1 was  
18 marked for identification.)

19 BY MR. ECKHART:

20 Q. Ms. Tornberg, do you recognize that  
21 document?

22 A. Yes, I did.

23 Q. You did receive a copy of it?

24 A. Yes, I did.

25 Q. And previously in this matter, you were

1 subpoenaed. You received a Subpoena, which your  
2 attorney accepted service of for a deposition in  
3 this case that I think was scheduled for  
4 September 11th; correct?

5 A. That is correct.

6 Q. And you are here today essentially under  
7 the understanding that this is a compulsory  
8 appearance on your part, that you're not here  
9 voluntarily; correct?

10 A. Yes.

11 Q. And I will represent, for the record that,  
12 you know, I did request a Subpoena from the Clark  
13 County District Court. There was a misunderstanding  
14 between myself and the clerk's office about what was  
15 needed for that. And so I don't have a Subpoena for  
16 you for this date, but you were subpoenaed for the  
17 prior date; is that correct?

18 A. Yes.

19 MR. ECKHART: Anything else you want to put  
20 on the record regarding the witness's appearance  
21 here today?

22 MR. HANSEN: No.

23 BY MR. ECKHART:

24 Q. Thank you.

25 Now, Ms. Tornberg, there was a previous

1 Subpoena that was issued to your -- well, let me  
2 step back.

3 Your current position is what?

4 A. Owner and C.E.O.

5 Q. Of?

6 A. Nevada International Trade Corporation.

7 Q. Is that sometimes abbreviated as NITCO,  
8 N-I-T-C-O?

9 A. Yes, it is.

10 Q. And are you aware that a Subpoena from the  
11 California Board of Equalization, the Tax Department  
12 in the State of California, was served on  
13 Mr. Anderlik, who is, I believe, your vice  
14 president?

15 A. Yes.

16 Q. And the documents were produced pursuant to  
17 that Subpoena to the California Board of  
18 Equalization?

19 A. Yes.

20 MR. ECKHART: I'm going to get a couple of  
21 other documents marked here. This is Plaintiff's  
22 Exhibit 2, and if you want to do Number 3 also.

23 (Whereupon Plaintiff's Exhibit Nos. 2 and 3  
24 were marked for identification.)

25 / / /

1 BY MR. ECKHART:

2 Q. Ms. Tornberg, showing you what's been  
3 marked as Plaintiff's Exhibit 2, I will tell you if  
4 you're not familiar with it, that is what I  
5 understand to be the Subpoena that was served by our  
6 Board of Equalization on Mr. Mr. Anderlik, your vice  
7 president.

8 Have you seen that document before?

9 A. Yes, I have.

10 Q. I'll then show you what's been marked as  
11 Plaintiff's Exhibit 3, and that appears to be an  
12 affidavit signed by Mr. Mr. Anderlik, which  
13 accompanied documents that he produced to the  
14 California Board of Equalization; is that correct?

15 A. That is correct.

16 Q. And you recognize that document as well?

17 A. Uh-huh, and his handwriting.

18 Q. Thank you. Now, you have produced  
19 documents today for this deposition; and as  
20 indicated off the record, I believe that you and  
21 your attorney were courteous enough to make them  
22 available to me ahead of time. So I have been  
23 sitting here in this room to which they were  
24 delivered, looking at them and trying to get them  
25 into some sort of organizational structure so we can

1 have you identify them for the record.

2 Now, the documents that -- as far as you  
3 know, were the documents that Mr. Anderlik produced  
4 pursuant to that Subpoena, which is Plaintiff's  
5 Exhibit 3, are those the same documents included  
6 within the documents that you produced today for  
7 your deposition?

8 A. Yes.

9 Q. And from my review of these documents, it  
10 appears -- and I'm just kind of asking for a general  
11 verification -- that there are some additional  
12 documents here that were not previously produced to  
13 the Board of Equalization pursuant to their  
14 Subpoena; is that correct?

15 A. Yes, that's correct.

16 Q. Thank you. Now, when you received the  
17 Notice of Deposition, there was, as you know, a list  
18 of items that we wanted produced.

19 A. Uh-huh.

20 Q. And if you want to turn to that --  
21 actually, I guess you have turned to that already.  
22 Now, can you tell me in general what you did in  
23 terms of searching the records of your business,  
24 NITCO, for the documents that were requested here?

25 What places did you look and files did you

1 look in?

2 A. Okay. As a Foreign Trade Zone, all records  
3 pertaining to any client in the Foreign Trade Zone  
4 are kept in one area. So I had the manager for that  
5 department pull all the records for the State of  
6 California, and then copies were made, and they were  
7 provided either prior or now to you.

8 Q. Now, who is the manager that you had do the  
9 search for you?

10 A. His name is Juan Gomez Marino.

11 Q. And Mr. Marino, does he have a title at  
12 your organization?

13 A. FTZ manager.

14 Q. "FTZ" stands for?

15 A. Foreign Trade Zone. I'm sorry.

16 Q. That's all right. We can clarify those  
17 things that I think need to be clarified.

18 Thank you. And just so I understand your previous  
19 response, you said that all the documents relating  
20 to certain customers are kept in one place?

21 A. That is correct, for Customs review and  
22 audit trail.

23 Q. And in terms of the customer that you were  
24 searching for, that was Native Wholesale Supply  
25 company?

1 A. That is correct.

2 Q. Were there files, other than paper files,  
3 that you had Mr. Gomez search -- or I'm sorry --  
4 Gomez Marino search?

5 A. In combination with Bob Anderlik, they both  
6 went through the files and then verified each one  
7 was correct.

8 Q. And as I indicated, I believe you had  
9 produced documents. In terms of the customer  
10 documents that we're talking about, these are  
11 documents indicating shipments of cigarettes from  
12 Native Wholesale Supply through NITCO into the State  
13 of California; correct?

14 A. They were directed to us by Native  
15 Wholesale Supply, but they were shipped from Grand  
16 River Enterprises.

17 Q. I see.

18 A. In Canada.

19 Q. But what I was referring to was the  
20 shipment from NITCO into California. You produced  
21 documents indicating shipments from NITCO into  
22 California; correct?

23 A. That is correct, as directed by Native  
24 Wholesale.

25 Q. And then from the period of time -- I

1 believe it was sometime in August of this year --  
2 you also produced, per the request, documents  
3 relating to shipments directed by Native Wholesale  
4 from NITCO, whether or not they were to California;  
5 correct?

6 A. That is correct. Only since August 13th,  
7 only to Native Wholesale directly.

8 Q. Let me go back and ask you some -- now that  
9 I have a general idea of what you've produced, we'll  
10 go through the documents, and I want to ask you some  
11 background questions. You indicated you're the  
12 president and C.E.O. of the Nevada International  
13 Trade Corporation. I have seen in other contexts  
14 reference to something called or some entity called  
15 the "Omni International Complex."

16 Is that something you're familiar with?

17 A. Not that I'm aware of.

18 Q. How long have you been president and  
19 C.E.O.?

20 A. Since 1986.

21 Q. And how would you describe the primary  
22 business of NITCO?

23 A. Warehouse and distribution services for  
24 domestic and international clients.

25 Q. And is the Foreign Trade Zone, is that a



1 portion of your business, or is that the  
2 exclusive --

3 A. It's a portion of.

4 Q. So there is a portion that is of a building  
5 or a warehouse that is designated as the Foreign  
6 Trade Zone; is that correct?

7 A. That is correct.

8 Q. How long has NITCO had the status of a  
9 Foreign Trade Zone?

10 A. Ever since Clark County's inception in  
11 1984.

12 Q. And is there a licensing or approval or  
13 permitting process for a Foreign Trade Zone that  
14 you're aware of?

15 A. Yes, there is.

16 Q. And who is responsible for doing that?

17 A. The Foreign Trade Zone board in  
18 Washington D.C. issues a grant to the grantee. In  
19 this case, that's Nevada Development Authority, who  
20 is our grantee; and Nevada Development Authority  
21 either acts as the operator or has an agreement for  
22 an exclusive or nonexclusive operator for the zone.

23 Q. And is NITCO the exclusive or nonexclusive  
24 operator?

25 A. It is exclusive.

1 Q. Which means that there are no other  
2 operators besides NITCO in FTZ, and I believe the  
3 number is Number 89; is that correct?

4 A. Number 89, that is correct.

5 Q. Now, there is also, I understand, some  
6 oversight of your operations by the U.S. Board of  
7 Protection and Customs?

8 A. That is correct.

9 Q. And what does that generally consist of,  
10 that oversight?

11 A. We must maintain full compliance with all  
12 U.S. Customs regulations and audit trail  
13 requirements.

14 Q. And are you regularly inspected by  
15 employees at the United States Government Customs?

16 A. Yes. We have a minimum of one and usually  
17 two annual inspections and semiannual inspections.

18 Q. Is Las Vegas, I understand -- I mean my  
19 understanding is that Las Vegas is part of the  
20 Los Angeles Port District; is that correct?

21 A. We're part of the Los Angeles District, but  
22 U.S. Customs and Border Protection has a port of  
23 entry in Las Vegas.

24 Q. So in terms of the grantee, you mentioned  
25 that that was the Nevada Development Authority?

1 A. Correct.

2 Q. And then what is the relationship of NITCO  
3 to the Nevada Development Authority?

4 A. Full reporting obligations and compliance  
5 with their regulations and rules.

6 MR. HANSEN: Just for clarification -- and  
7 I hope it's okay if I step in every once in a while.  
8 Nevada Development Authority is a public subdivision  
9 of Clark County, Nevada, for the State of Nevada.

10 THE WITNESS: They are a public entity.  
11 Their business is a public entity; and it has to be  
12 either a city, state, or public entity to have the  
13 grant.

14 BY MR. ECKHART:

15 Q. I see. Okay. Thank you.

16 Can you tell me generally what a Foreign  
17 Trade Zone -- what does it mean to be a Foreign  
18 Trade Zone?

19 A. That's about a three-hour question.

20 Q. Well, let's try to break it down, and maybe  
21 you can just -- I can tell you what I understand to  
22 be the general parameters, that a Foreign Trade Zone  
23 is a place where goods that are imported from  
24 outside the United States, or that originate outside  
25 the United States, can be stored and, in some

1 instances, certain activities can occur on those  
2 products.

3 They can be repackaged, reconfigured. But  
4 they are all, during that period of time, considered  
5 to be not yet on U.S. soil for general -- you know,  
6 they're not entered into the United States when they  
7 are in the Foreign Trade Zone under Customs' bond.  
8 Maybe I have put too much in that question. So  
9 maybe if you want me to break it down.

10 A. One point of clarification.

11 Q. Okay.

12 A. They are in the United States for the  
13 purpose of storing them. But anything entering from  
14 outside of the United States is actually in Foreign  
15 Trade Zone, which is outside the commerce of the  
16 United States, as far as U.S. Customs requirements  
17 go, so until they enter the commerce of the  
18 United States, not enter the United States.

19 Q. I appreciate that clarification. Thank you.

20 What does it take for a product, or  
21 whatever that's in the Foreign Trade Zone that is  
22 currently outside the commerce of the United States,  
23 what does it take to get that product into the  
24 commerce of the United States?

25 What steps must be taken as far as the

1 Foreign Trade Zone is concerned?

2 A. When the goods come into the Foreign Trade  
3 Zone, they are received on what is referred to as a  
4 "214" or "Foreign Trade Zone entry." That entry  
5 runs the entire length of time it stays in the  
6 Foreign Trade Zone. It's assigned a zone lot  
7 number. When the customer advises their customhouse  
8 broker that they need certain products shipped or  
9 removed from FTZ status, at that point, we receive  
10 an entry notice from the broker and Customs that we  
11 may release that product.

12 Clear?

13 Q. Uh-huh. Thank you.

14 A. It's such a simplification. I apologize.

15 Q. That's okay. I think we just need the  
16 broad overview for the purposes, just for background  
17 so when we get to the specific documents, we'll know  
18 what we're talking about here. And I may have other  
19 specific questions as we go through.

20 But in general, when goods are within the  
21 Foreign Trade Zone and they're still outside the  
22 commerce of the United States, to use your  
23 phraseology, who is responsible for the cost of  
24 storage and handling those products while they're in  
25 the FTZ?

1 A. The customer, the importer of record.

2 Q. And are there any requirements with regard  
3 to the ownership of the documents -- not the  
4 "documents," excuse me -- the goods when they're in  
5 the Foreign Trade Zone?

6 In other words, the importer of record is  
7 responsible for storage and handling, but does it  
8 matter whether the importer is the legal owner or  
9 not, at that point, as far as the Foreign Trade Zone  
10 is concerned?

11 A. That is a hard question to answer because  
12 it can be either way. It's just depending on U.S.  
13 Customs' rules and regulations.

14 Q. Now, you indicated that there were some, in  
15 your -- in the broad answer that, in terms of when  
16 the goods are ready to be released, you get a  
17 clearance from U.S. Customs for the release of the  
18 documents into inner commerce; correct?

19 A. Not necessarily into commerce, but to  
20 release the goods to whoever the owner of the goods  
21 specifies.

22 Q. I see, I see.

23 A. And for clarification, all documents that  
24 we receive that are Customs' entries or clearances  
25 are through the customhouse broker.

1 Q. And in this case, I understand the  
2 customhouse broker for Native Wholesale is a company  
3 called Gene Mack? G-E-N-E.

4 A. Uh-huh, that is correct.

5 Q. And they have an office here in Las Vegas?

6 A. And in Los Angeles.

7 Q. So would I be correct in assuming that the  
8 Customs' broker handles things like the payment of  
9 the duties on product that's entering the  
10 United States?

11 A. They act on behalf of the customer, their  
12 customer, which eventually is ours. But they act on  
13 behalf of the customer, and they handle all of the  
14 documents and any fees or duties that have to be  
15 paid.

16 Q. And I think you already said that they also  
17 handle the paperwork with U.S. Customs?

18 A. That is correct.

19 Q. Now, does an importer which uses your  
20 facility have to have a license from the federal  
21 government, an importer's license, or permit I guess  
22 it may be called?

23 A. Yes, they do. Under normal circumstances,  
24 the broker has that on file.

25 Q. Is there any kind of bonding requirement

1 that relates to the storage of goods in your  
2 facility, in the FTZ portion?

3 A. Yes. The Customs' broker does handle the  
4 bonds for the customer; and then we also have an FTZ  
5 bond, which is general.

6 Q. What I'd like to do is focus -- maybe we  
7 should -- now, the FTZ has had a customer  
8 relationship with Native Wholesale Supply for a  
9 number of years; is that correct?

10 A. Yes.

11 Q. And do you know when that relationship  
12 began?

13 A. 2001.

14 MR. ECKHART: And you've produced some  
15 documents pursuant to the list of documents in the  
16 deposition notice that appear to be leases and other  
17 documents relating to that relationship. I'm going  
18 to ask that we mark these as basically one exhibit.  
19 Let's do plaintiff's next in order.

20 (Whereupon Plaintiff's Exhibit No. 4 was  
21 marked for identification.)

22 BY MR. ECKHART:

23 Q. I will ask you to identify this here.

24 A. I really apologize, but I'm having a  
25 terrible time hearing you.



1 Q. I'll speak up a little bit. I didn't want  
2 to over power.

3 A. No. Believe me, you won't.

4 Q. Showing you what's been marked as  
5 Plaintiff's Exhibit 4, are those documents that you  
6 produced pursuant to the deposition notice?

7 A. That is correct.

8 Q. And as far as your search of the record  
9 indicates, those are all of the formal arrangements  
10 between yourself and Native Wholesale Supply, which  
11 are in the nature of a lease or an agreement whereby  
12 you agree to store product at your facility;  
13 correct?

14 A. Yes, that's correct.

15 Q. Thank you. May I see those just for a  
16 moment. Some of these are not dated, but I do think  
17 there was one that actually is dated December 27th,  
18 2001. That's actually the third page of this  
19 exhibit called an Addendum. So there must be an  
20 earlier -- I don't find dates on most of these  
21 documents, but it's your recollection anyway that --

22 A. Yes, they are.

23 Q. -- they have been your customer for, at  
24 least, since December of 2001?

25 A. That's correct.

1 Q. Now, it's also my understanding that, in  
2 terms of the records you produced, both pursuant to  
3 the Subpoena from the Board of Equalization as well  
4 as at this deposition, go back approximately to late  
5 December, 2003; is that correct?

6 A. That's the date we were requested to start  
7 providing the documents from.

8 Q. Now, it's also my understanding, from  
9 information I had from Mr. Anderlik, that there had  
10 been some kind of a fire at your facility and some  
11 records were destroyed, and particularly, records  
12 prior to December of 2003 relating to Native  
13 Wholesale Supply; is that your understanding?

14 A. Basically, yes.

15 Q. And I'll represent to you, as you probably  
16 know, the documents that he provided to us, the  
17 first set of documents indicating a shipment out of  
18 the Foreign Trade Zone into California was  
19 December -- I think it was December 29th, 2003; and  
20 is that your understanding that there are no records  
21 prior to that time, even though Native Wholesale has  
22 had an arrangement with you since 2001, that you  
23 don't have records earlier than that?

24 A. There are documents, but they would be  
25 located with U.S. Customs. We had verified that

1 they did have the documents.

2 Q. Now, I'd like to get kind of a general idea  
3 of how -- I assume it's a fairly simple process:  
4 The product comes in on a big truck and you store  
5 it, and then when Native Wholesale Supply tells you  
6 it's time to ship it out, you ship it out; you  
7 arrange for the shipping out.

8 During the period of time in which Native  
9 Wholesale Supply has been your customer, have there  
10 been any major changes -- let's take the period  
11 before August 13th of this year -- have there been  
12 any major differences in the arrangements that were  
13 made?

14 In other words, in terms of trucks coming  
15 into your facility and then leaving and then other  
16 trucks being loaded and leaving the facility, have  
17 there been -- I'm sorry. Let me start again.

18 MR. HANSEN: And I'm going to put -- I'm  
19 just going to put an objection to the form of the  
20 question on the record, and I think there was one  
21 thing that you said in there that was a little bit  
22 incorrect in that you said that NITCO arranged for  
23 shipping, when it's the customer that arranges for  
24 shipping.

25 And we have a couple of exemplars. These

1 are the highlighted, the things with the highlights  
2 on them. And to kind of go through the process, it  
3 may be easier for her to explain with these  
4 exemplars. One is from pre-August 12, 2008; and one  
5 is after August of 2008.

6 MR. ECKHART: Let's do that.

7 MR. HANSEN: And then because that, I  
8 think, will then allow you to see that this is  
9 basically what happens over and over and over again.

10 MR. ECKHART: Right. Thanks. I appreciate  
11 your suggestion. I didn't mean to misspeak. It was  
12 just purely --

13 MR. HANSEN: Yeah, it's okay.

14 MR. ECKHART: Let's mark this as  
15 plaintiff's next in order, which is a document, at  
16 least it is on the first page, imprinted is  
17 4/11/2007, Big Sandy Rancheria, Invoice Number 8110.  
18 And in handwriting on the side, it says, "Example  
19 before 8/12/08."

20 If you want to mark that as plaintiff's  
21 next in order.

22 (Whereupon Plaintiff's Exhibit No. 5 was  
23 marked for identification.)

24 MR. ECKHART: And just be ready to mark  
25 that one, please.

1 Q. Looking at what's been marked as  
2 Plaintiff's Exhibit 5, the word "Example before  
3 8/12/08," is that your handwriting?

4 A. No. Bob Anderlik.

5 Q. And why did you select that as an example?

6 A. I didn't. I just told him to pull a copy  
7 of one prior to 8/12, one after 8/12.

8 Q. Let's walk through that document then.  
9 There are several pages to that document. The first  
10 page is a grid of, you know, lined boxes. It has  
11 certain information in the top left-hand corner, a  
12 date, and then a name and an invoice number.

13 Who creates this document?

14 A. The customer. This is produced by us based  
15 on information provided by our customer, Native  
16 Wholesale.

17 Q. I see. Is this a copy of a spreadsheet?

18 A. Yes, it is.

19 Q. So you also have a computer record from  
20 which this printed document was created?

21 A. That is correct.

22 Q. And who assigns the invoice number to that  
23 document?

24 A. Native Wholesale.

25 Q. And so the other information, such as the

1 name of the entity Big Sandy Rancheria, that would  
2 also be supplied by the customer?

3 A. Yes.

4 Q. But this document is created by your staff?

5 A. That's correct.

6 Q. But it's based upon information that you  
7 received from Native Wholesale?

8 A. Actually, I think it would be even clearer  
9 if this had been the second page.

10 Q. I see.

11 A. The first -- the next page that you have  
12 there, this is what we receive.

13 Q. And you're referring now -- just for the  
14 record, you're --

15 A. To the invoice.

16 Q. -- referring to the document called at the  
17 top says, "Invoice/Bill of Lading, Native Nation,  
18 Invoice" and then a pound sign, which is a document  
19 that --

20 Now, where does that document come from?

21 A. Native Wholesale.

22 Q. And how does NITCO receive that document?  
23 How is it transmitted to NITCO?

24 A. Usually by fax and/or electronically.

25 Q. "Electronically" meaning by e-mail or --

1 A. Yes. Normally, they're sent to us by fax,  
2 as you can see the fax number right on the top.

3 Q. And you recognize that fax number as Native  
4 Wholesale's fax number?

5 A. Yes.

6 Q. So this is the second document of what's  
7 been marked as Plaintiff's Exhibit 5.

8 A. Yes.

9 Q. And this is the document then that  
10 initiates at your facility the preparation of a  
11 shipment?

12 A. This is what initiates the pulling of  
13 product from different zone lot numbers. On the  
14 first page that you looked at, there's zone lot  
15 numbers across the top. Many times when they  
16 indicate a particular item, there may be two or  
17 three zone lot numbers we have to pull that from,  
18 and that's why we indicate in the spreadsheet form  
19 instead of just 20 cases of.

20 Q. Now, what is a "zone lot"?

21 A. A "zone lot" is a lot number that Foreign  
22 Trade Zone designates for a receipt of a shipment  
23 that comes in from another country or domestically  
24 to be exported.

25 Q. Does it represent a physical location

1 within the warehouse?

2 A. It represents a physical identification for  
3 all materials received on that truckload.

4 Q. I see. And let's assume a truck arrives  
5 with product from Native Wholesale, does it  
6 typically go into one zone lot, or does it just  
7 depend upon what space is needed, so it might go  
8 into more than one zone lot?

9 A. No. It goes into one zone lot for each  
10 truck.

11 Q. So what this document, the first page of  
12 this document, what it shows me is that you had to  
13 pull product or pull goods from various shipments  
14 received at different times in order to make up an  
15 outgoing shipment?

16 A. That is correct.

17 Q. Now, on that first page, again, there's  
18 some totals down at the bottom. One says "Zone  
19 total."

20 What does that number represent?

21 A. Represents the total number of cases that  
22 they wanted us to pull.

23 Q. And then the other numbers, which are the  
24 Opal 30s and Seneka 60s, there are two lines there  
25 that are essentially subtotals of the zone total?



1 A. That is correct, uh-huh.

2 Q. And those are different brands; is that  
3 your understanding?

4 A. That is correct.

5 Q. Let's look at that second page one more  
6 time. Now, there is both typed printed information  
7 as well as handwritten information. Who is  
8 responsible -- and you said this is received from  
9 Native Wholesale, either by fax or electronic  
10 transmission -- are the handwritten entries on that  
11 document when you receive it?

12 A. No. That's what we actually indicate what  
13 zone number -- sorry -- zone lot number we pulled  
14 them from.

15 Q. I see.

16 A. And we do this first before this is  
17 generated.

18 Q. And by "this," you meant the handwritten  
19 markings on the second page, before you create the  
20 Excel spreadsheet, which is represented on the first  
21 page?

22 A. That is correct.

23 (Discussion off the record.)

24 BY MR. ECKHART:

25 Q. And I apologize because I'm a slow talker.

1 So quick thinkers and slow talkers don't always get  
2 along in deposition. So we'll both work on it.

3 A. Thank you.

4 Q. Let's look at the second page again, and  
5 I'm going to -- and I just want to, just for the  
6 purposes of understanding how the process works,  
7 this has several items that have been, at the top,  
8 printed items that have been highlighted.

9 One is a "Seller." One is a name next to  
10 the word Seller, and then there is a Place of Sale  
11 and something else, another name highlighted; and  
12 then over here on the right side, it says "Sold to"  
13 and then "Shipped to," and that's basically --

14 MR. HANSEN: It says, "Billed to."

15 BY MR. ECKHART:

16 Q. Oh, "Billed to." I'm sorry. Let me get  
17 the staple out of the way.

18 Again, all that information on this  
19 particular document was supplied to you by Native  
20 Wholesale; correct?

21 A. That is correct. This is representative of  
22 everything we received from them each time there's a  
23 release.

24 Q. Now, let's look at the -- let me look at  
25 the third page of this document, and this third

1 page, we can identify it as a Con-Way Straight Bill  
2 of Lading. And Con-Way is a trucking company;  
3 correct?

4 A. That is correct.

5 Q. Now, and this is a document that is  
6 prepared by whom?

7 A. By our warehouse people.

8 Q. So the handwritten entries, as well as the  
9 typewritten entries, are prepared by your warehouse  
10 people?

11 A. That is correct.

12 Q. And the selection of the carrier, who makes  
13 that selection?

14 A. The customer, Native Wholesale.

15 Q. And during the period of time in which you  
16 had a customer relationship with Native Wholesale,  
17 has Con-Way been the -- well, for this period of  
18 time up through August 13th, let's leave it at that.

19 For that period of time, are you aware of  
20 any other carriers that your customer, Native  
21 Wholesale, has used as the shipper or as the common  
22 carrier that picks up the product from the FTZ and  
23 takes it into California?

24 A. There have been a lot of times where  
25 they've designated someone else.

1 Q. But Con-Way is fairly on many of them?

2 Well, you don't have to answer that. The records  
3 can speak for themselves.

4 But at least in this instance, the customer  
5 selected Con-Way?

6 A. Yes.

7 Q. So you maintain a copy of this in your  
8 records?

9 A. That is correct.

10 Q. And I assume that Con-Way receives a copy  
11 of it as well?

12 A. Yes, they do.

13 Q. Does the customer receive a copy?

14 A. Yes. We send a copy to them also.

15 Q. And then you were pointing to a signature  
16 here at the bottom which indicates the --

17 A. The warehouse.

18 Q. I take it that's --

19 A. The warehouse signature and then the  
20 driver's signature.

21 Q. Does a copy of this go to the Customs'  
22 broker?

23 A. No. They don't get a copy of that because  
24 they designate that to us.

25 Q. Now, there is a box here on the right-hand

1 side, it says "Consignee," and then it's in  
2 parentheses "To," that indicates the place where the  
3 shipment is going; correct?

4 A. That is correct. To the best of our  
5 knowledge, because that's who we consigned it to.

6 Q. I see, I see. And that's handwritten on  
7 this document, but that still an entry by the FTZ  
8 staff; correct?

9 A. Yes. Based on the information that was on  
10 page 2.

11 Q. Page 2 which indicates, in this instance,  
12 that the -- well, let's go back to page 2 just for a  
13 second on this one. Now, this one indicates that it  
14 was the only names -- well, I shouldn't say "the  
15 only names."

16 The "Seller" and "Place of sale" both list  
17 Native Wholesale Supply; correct?

18 A. Right.

19 Q. And then over here on the "Sold to  
20 purchaser" and the "Billed to" line, it lists Big  
21 Sandy Rancheria.

22 A. That's correct.

23 Q. And over here on the Con-Way Straight Bill  
24 of Lading, it indicates the consignee Huber  
25 Enterprise?

1           A.    One in the same, to the best of our  
2 knowledge.

3           Q.    Different address though because they're in  
4 a different city; correct?

5           A.    That is correct.

6           Q.    With regard to what's been marked as  
7 Plaintiff's 5 -- and maybe you can help me. I can't  
8 see anything on the first two pages that indicates  
9 that the consignee in this case would be Huber  
10 Enterprise. I know there are others that I've seen  
11 where, for instance, Huber Enterprise is listed on  
12 the first page, which is essentially your  
13 spreadsheet.

14          A.    That's correct.

15          Q.    And so in this instance, the indication to  
16 me would be, at some point, you got an instruction  
17 from Native Wholesale that this particular shipment  
18 should be sent not to Big Sandy Rancheria in Auburn,  
19 California, but to Huber Enterprise in Lolita,  
20 California; is that correct?

21          A.    That is correct. Either they call and tell  
22 us, or they go ahead and have the broker advise us  
23 by phone.

24          Q.    And when you say "they," who do you mean?

25          A.    Native Wholesale.

1 Q. And do you receive phone calls from any  
2 particular persons at Native Wholesale?

3 A. Just anyone in their main accounting or  
4 sales office.

5 Q. And then there's a fourth document in  
6 what's been marked as Plaintiff's Exhibit 5, which  
7 is apparently a U.S. Department of Homeland Security  
8 form.

9 A. That's correct.

10 Q. Called Entry Immediate Delivery. And is  
11 that document received by NITCO relating to this  
12 shipment?

13 A. That is correct.

14 Q. And it comes from the Customs' broker;  
15 correct?

16 A. That is correct.

17 Q. Are any of the entries on this form entries  
18 that were made by NITCO employees?

19 A. No signatures or anything on here, no.

20 Q. And that document is received by -- how is  
21 it usually received, by fax or by electronic  
22 transmission or --

23 A. They normally hand-deliver them from the  
24 Las Vegas office.

25 Q. I see. And you need that document, as I

1 understand it, before you can release the shipment?

2 A. Yes, definitely.

3 Q. Now, what is the usual sequence of the  
4 receipt of documents? Which of these documents do  
5 you receive first and which last?

6 Or let's just say which of these four  
7 documents here would you typically receive first?

8 A. The first one would be the order from  
9 Native Wholesale. The same time we receive it,  
10 Gene Mack receives it. Then they wait for us to  
11 give them the spreadsheet to tell them what zone  
12 lots we're taking it out of because on their  
13 document to Customs, they have to list those zone  
14 lot numbers.

15 Q. I see. Those in the lower left-hand corner  
16 of the document, the last document in that exhibit;  
17 correct?

18 A. That is correct.

19 Q. So that you receive the -- we talked about  
20 the invoice; we talked about the spreadsheet, and  
21 then you receive this Customs' document filled out  
22 by Gene Mack?

23 A. That is correct.

24 Q. So the last item essentially is the Bill of  
25 Lading?



1 A. That is correct.

2 Q. Let me look at this just one more time  
3 here. Now, on this document, the fourth document,  
4 the Customs' document, it lists -- it has a box  
5 called "Ultimate Consignee Name," and it lists on  
6 this document Native Wholesale Supply Company;  
7 correct?

8 A. That's the way we always have it.

9 Q. Now, Ultimate Consignee, in this parlance,  
10 appears to mean something different from the word  
11 Consignee on the Con-Way Bill of Lading because that  
12 lists, in this instance, Huber Enterprise.

13 A. Because U.S. Customs requires to know who  
14 is actually getting the merchandise, they show the  
15 Consignee as the owner, which is Native Wholesale.  
16 Then the Bill of Lading and the instructions from  
17 Native Wholesale to us tells us where it is to be  
18 shipped or if they're going to be picking it up with  
19 their own truck.

20 But that is the correct series of events  
21 the way you went through. The only thing I would  
22 add is it would have been a more complete package if  
23 you had asked for the entry documents also.

24 Q. And those would be -- who would complete  
25 those documents?

1 A. Native Wholesale and then Gene Mack.

2 Q. And how many documents are we talking  
3 about? Wait. The number maybe is not relevant.

4 Why don't you tell me what those  
5 documents -- if you can identify what those  
6 documents are.

7 A. The shipping documents from the shipper,  
8 which is an In-Transit, and it shows FTZ entry.

9 Q. Now, those are documents that would be  
10 representing the shipment into the Foreign Trade  
11 Zone?

12 A. Coming in to us. That's when the zone lot  
13 number is assigned, which you then would be able to  
14 compare it to.

15 Q. And that is a U.S. Customs' form that  
16 accompanies that or that is related to that  
17 shipment?

18 A. Yes.

19 Q. Are there other documents, other entry  
20 documents, as you described them, besides that form?

21 A. No, not from U.S. Customs.

22 Q. Are there other documents that Native  
23 Wholesale provides to the Foreign Trade Zone?

24 A. No. Those four are the full amount when  
25 we're ready to make a shipment out.

1 Q. Well, the document you described a minute  
2 ago sounds like a document relating to the receipt  
3 by FTZ.

4 A. Yeah. That's why I say it wouldn't be as  
5 appropriate for you wanting to know about the  
6 outbound shipments, but it makes the picture more  
7 complete when you're describing it.

8 Q. Are there any other -- just so I'm clear,  
9 are there any other documents relating to the  
10 shipment to the release of the product from the  
11 Foreign Trade Zone, other than these four?

12 A. No.

13 Q. So you don't receive any Customs' forms,  
14 besides this one, that the product is entering the  
15 United States commerce for consumption?

16 A. No.

17 Q. You don't --

18 A. That's all we receive from Customs.

19 Q. The only document is the one you referred  
20 to earlier, I think, as a 214 form?

21 A. Correct. That's inbound.

22 Q. Inbound, okay. You also, although -- well,  
23 I should ask do you also receive or have you  
24 received copies of or get copies of the Bill of  
25 Lading from the common carrier that is bringing

1 product into the Foreign Trade Zone?

2 A. Yes, we do.

3 Q. In terms of the shipments into the Foreign  
4 Trade Zone that are Native Wholesale directed  
5 shipments -- I'm not using that in any technical  
6 sense; I'm just saying in terms of the shipments  
7 that you received and that are assigned a lot  
8 number, once they arrive in the Foreign Trade Zone,  
9 do you know where those shipments originate?

10 A. It would be on the Bill of Lading, yes.

11 Q. Now, when you receive this document from  
12 Gene Mack, the fourth page of Plaintiff's Exhibit 5,  
13 what does this document indicate to you?

14 What information does it provide you as the  
15 Foreign Trade Zone operator?

16 A. It lets us know that U.S. Customs has  
17 approved us to release a certain quantity of  
18 cigarettes, the number being so many cases, the  
19 brand, or whatever the zone lot number is, and the  
20 total amount that's to be released.

21 Q. And is there anything on this document that  
22 indicates the product is -- well, let's strike that.

23 Is it your understanding, upon receipt of  
24 this document for shipment, an outgoing shipment,  
25 that the product is entering U.S. commerce at that

1 point?

2 A. It is clear to enter, to go to Native  
3 Wholesale or as they direct.

4 MR. ECKHART: We have another document -- I  
5 guess we maybe jumped ahead here. Let's do this as  
6 next in order, please.

7 (Whereupon Plaintiff's Exhibit No. 6 was  
8 marked for identification.)

9 BY MR. ECKHART:

10 Q. I'm going to show you what's been marked as  
11 Plaintiff's Exhibit 6, and this is an Affidavit of  
12 Arthur Montour.

13 Do you know who he is?

14 A. Yes, I do.

15 Q. And who is he?

16 A. He is the owner, to the best of my  
17 knowledge, and signer on all our paperwork for  
18 Native Wholesale.

19 Q. Now, I'm going to direct your attention to  
20 paragraph 4 on the second page, and this paragraph  
21 says: Native -- "NWS," which is abbreviation for  
22 Native Wholesale Supply, "Purchases and imports  
23 cigarettes from Grand River and then stores the  
24 cigarettes, parentheses, (after they pass through  
25 Customs) at one of three facilities: A, the Western

1 New York Foreign Trade Zone in Lackawanna, New York;  
2 B, the Southern Nevada Foreign Trade Zone in  
3 Las Vegas, Nevada; and C, a bonded warehouse on the  
4 Seneca Cattaraugus Indian territory."

5 Now, would it be your understanding that  
6 the Southern Nevada Foreign Trade Zone in Las Vegas,  
7 Nevada refers to your facility?

8 A. Yes, it does.

9 Q. Do you know or have any understanding of  
10 what Mr. Montour means by the parenthetical phrase  
11 "after they pass through Customs"?

12 A. Customs' documents are prepared by the  
13 customhouse broker, and so they have to be presented  
14 to Customs before Customs will let them come into  
15 our facility or any Foreign Trade Zone or bonded  
16 facility.

17 Q. And that would be the entry document that  
18 you were talking about earlier?

19 A. That's right.

20 Q. But there are other Customs' requirements,  
21 as we've talked about today, before the product is  
22 actually -- in other words, there are more Customs'  
23 requirements before the product can actually enter  
24 the United States and leave your facility?

25 A. Yes.

1 Q. Correct?

2 A. The documents we described.

3 MR. ECKHART: Thank you. Now we can mark  
4 this one as the next in order.

5 (Whereupon Plaintiff's Exhibit No. 7 was  
6 marked for identification.)

7 BY MR. ECKHART:

8 Q. Now we're going to look at this other  
9 document which, for the record, we've marked as  
10 Plaintiff's Exhibit 7. It has the date of  
11 8/15/2008, and at the top it says, "NWS INV," which  
12 I assume stands for Invoice 10543; and then in  
13 handwriting on the right-hand side are the words  
14 "Example after 8/12/08." I'm going to show you  
15 that, and that is a document which --

16 Now, was that selected by Mr. Anderlik as  
17 well?

18 A. Yes, it was.

19 Q. And it, again, is an example of shipment  
20 documents and orders that were filled by -- let me  
21 strike that -- shipment record relating to shipment  
22 made from NITCO after August --

23 A. 12th.

24 Q. -- 12th, 2008; Correct?

25 MR. HANSEN: And I'm going to object to the

1 form of the question in that it refers to it as a  
2 "shipment" when it's probably better characterized  
3 as a release of product.

4 BY MR. ECKHART:

5 Q. That's fine.

6 With that correction; is that correct?

7 A. Yes.

8 Q. Now, again, the first page of that  
9 document, it looks similar in many respects to the  
10 previous document we were looking at. It looks like  
11 a printout of an Excel spreadsheet.

12 A. That is correct.

13 Q. And it has a date and the name of or, in  
14 this case, initials which stand for Native Wholesale  
15 Supply; correct?

16 A. Yes.

17 Q. And then the invoice number, again, is an  
18 invoice number that you received from Native  
19 Wholesale Supply?

20 A. That is correct.

21 Q. Let's look at the second page because, as  
22 you indicated before, that's really what starts this  
23 process.

24 A. Right.

25 Q. Now, this document, it appears to be



1 similar to the other. It's called an Invoice/Bill  
2 of Lading, Native Nation.

3 A. That's correct.

4 Q. And it also was received from Native  
5 Wholesale; correct?

6 A. That's correct.

7 Q. So we were talking about Plaintiff's  
8 Exhibit 7, and the second -- I think, yes -- and in  
9 the second page is the document that you received  
10 from Native Wholesale; correct?

11 A. Yes.

12 Q. And it also has the Native Wholesale fax  
13 number at the top. So it would indicate that this  
14 one was received by fax?

15 A. That's correct.

16 Q. Again, the printed information is all  
17 supplied to you by Native Wholesale?

18 A. That is correct.

19 Q. And the handwritten information was entered  
20 by your staff?

21 A. That's correct.

22 Q. And then that information, the printed and  
23 the handwritten information, is then entered as  
24 necessary onto the spreadsheet indicating the zones  
25 from which product was taken or product was gathered

1 together, so to speak?

2 A. Withdrawn.

3 Q. Withdrawn.

4 And then has similar totals in terms of the  
5 zone totals and then the totals by brand; correct?

6 A. That is correct.

7 Q. Now, let's look again at the second  
8 document which you receive from Native Wholesale.  
9 This is Invoice Number 10543. I believe that the  
10 entire number, yes, 10543 indicates the seller as  
11 Native Wholesale Supply; correct?

12 A. That's correct.

13 Q. And the Place of Sale is Native Wholesale  
14 Supply?

15 A. Correct.

16 Q. And then the ship to (sic) Native Wholesale  
17 Supply?

18 MR. HANSEN: That's "Sold to."

19 BY MR. ECKHART:

20 Q. Excuse me. I'm sorry. And then billed to  
21 also Native Wholesale Supply; correct?

22 A. That is correct.

23 Q. So when you receive this document, what  
24 does this document tell you about the disposition of  
25 these goods, once you have the other necessary

1 documentation, particularly the Customs' document  
2 from Gene Mack?

3 What does that tell you about where this  
4 product is going?

5 A. This particular identification on this  
6 invoice shows me that it is being picked up --  
7 ordered by and then picked up by Native Wholesale  
8 directly.

9 Q. The third document is a document that  
10 actually looks different from the document -- at  
11 least there is no similar document in the other  
12 exhibit; correct?

13 A. This is our tally-out that would go to a  
14 driver or truck that came in for Native Wholesale.  
15 So this is our tally-out since we would not have an  
16 actual common carrier Bill of Lading.

17 Q. And why not?

18 A. Because there was no common carrier that  
19 came in to pick it up. They picked it up at our  
20 dock with their truck.

21 Q. Is this document, this tally-out document,  
22 are all the entries on that document completed by  
23 your staff or by someone else?

24 A. By our staff. We actually have that on the  
25 computer, and we can print it out, and it's signed

1 for by the driver.

2 Q. I see. Can you make out the driver's name?

3 A. I wish I could. I'm not honestly sure. It  
4 looks like Brian. Brian? I'm not sure.

5 Q. Now, when you say this is picked up by  
6 Native Wholesale, do you know whether or not whether  
7 they are using a common carrier?

8 A. I would never know that in advance. All I  
9 know is, when they come in, they tell us they're  
10 making a pickup for Native Wholesale, and that's how  
11 we release it.

12 Q. I see.

13 A. By "Self," yeah. That's why they put right  
14 on there "self."

15 Q. When you say "they" put that on there, who  
16 puts that on?

17 A. We print it on from the information they  
18 provided us on this order.

19 Q. Right, on the second --

20 A. That is correct. That they're going to  
21 actually ship via Seneca Nation, which would mean  
22 their truck, their whatever.

23 Q. Now, that's a notation, a printed notation  
24 on the second page, the words "via" --

25 A. Direct from Native Wholesale.

1 Q. Have you personally seen any of the  
2 vehicles that have picked up this product for these  
3 shipments?

4 A. I would have to say probably very, very  
5 rarely and certainly not in the past few months.

6 Q. So you don't know whether they were using a  
7 U-Haul truck, a Ryder truck, a pickup truck?

8 A. I'm sorry. I can't tell you that.

9 Q. In terms of the size of the shipment, can  
10 you tell me what size of a truck would be required  
11 to pick up that much product at one time?

12 A. It could go into anything from the size of  
13 a U-Haul all the way up to a bobtail. It wouldn't  
14 be in a major trailer, I don't believe. But, again,  
15 that's just supposition.

16 Q. A bobtail is -- how long is a bobtail  
17 trailer?

18 A. A bobtail can be anywhere from 18-foot to  
19 26-foot.

20 Q. This particular document indicates how many  
21 cases going out?

22 A. 146.

23 Q. And do you know how many cases fit on a  
24 pallet, approximately?

25 A. Approximately 30 to 40.

1 Q. So that would be then only about maybe four  
2 or five pallets at the most?

3 A. That is correct. It just depends on how  
4 they stack them.

5 Q. Your staff though still sets up the pallets  
6 for loading?

7 A. That is correct.

8 Q. And who does the physical loading onto the  
9 truck? Is that still your staff?

10 A. It's our staff.

11 Q. Who at your facility would know the -- or  
12 would observe the trucks?

13 Would it be your loading dock personnel?

14 A. It could be loading dock; could be  
15 security, or any one of the people that drive a  
16 forklift.

17 Q. All right. And then the last document,  
18 just to complete our review of this particular  
19 exhibit, is again an Entry/Immediate Delivery or an  
20 Entry/Immediate Delivery document, again, completed  
21 apparently by Gene Mack or whatever, their  
22 employees; correct?

23 A. That is correct.

24 Q. And if I may just -- if I may quickly here,  
25 this, again, indicates the Ultimate Consignee as

1 Native Wholesale Supply and the Importer of Record  
2 as Native Wholesale Supply.

3 A. That's correct.

4 Q. This document is essentially the same as  
5 the previous document. It doesn't indicate to whom  
6 the product is being released?

7 A. It does indicate who it's being released.  
8 It's being released to Native Wholesale Supply at  
9 our dock.

10 Q. I see. Previous document, which was  
11 Exhibit 5, let's just look at that for comparison  
12 purposes, and I'm really just trying to understand  
13 how the differences -- this document actually still  
14 indicates Ultimate Consignee as Native Wholesale  
15 Supply.

16 A. That is correct.

17 Q. And how does this document, which is part  
18 of Exhibit 5 -- does it reflect in any way that this  
19 product was being sent to someone other than Native  
20 Wholesale Supply? In other words, there is a Bill  
21 of Lading, but that's separate from this document.

22 A. Not on the entry document itself because  
23 everything on there is on the other documents that  
24 accompany it to Customs.

25 Q. I see. All right. Just one more question

1 about this particular part of Exhibit 5. It lists  
2 as Importer of Record, Gene Mack.

3 Was that probably an error?

4 A. No, it was not. At that particular time,  
5 Gene was doing some -- he was actually acting on  
6 their behalf; he had their Power of Attorney and  
7 acted on their behalf.

8 Q. But as far as you know, Gene Mack doesn't  
9 hold an importer's license or a permit?

10 A. No, not to the best of my knowledge.

11 Q. Are you doing okay? Do you need a  
12 five-minute break.

13 A. No.

14 (To the reporter) Do you? My fingers  
15 aren't working that fast.

16 THE REPORTER: No. Thank you though.

17 BY MR. ECKHART:

18 Q. Before I mark these, I think I'm going to  
19 have you tell me what these are. When I try to find  
20 the piece of paper which was on the -- I'm just  
21 going to have to show you these. This stack of four  
22 sets of documents that are binder-clipped together  
23 had a rubber band around it. I can find the rubber  
24 band, but I'm looking for the piece of paper that  
25 had some handwritten -- I'm not seeing that. That



1 doesn't seem to be it.

2 Let me show you these, and maybe we can  
3 just do it that way. Somehow it has disappeared in  
4 the pile here. But I'm showing you what's about a  
5 two-inch stack of documents bound together by four  
6 binder clips, and what these appear to be -- and  
7 maybe you can verify -- they appear to be releases  
8 from the Foreign Trade Zone since August 12th.

9 Was that the date, August 12th of 2008?

10 And I'm not sure why they're in the groups  
11 that they're in. And while you're looking at those,  
12 I will look for that piece of paper that -- here it  
13 is. On the top of that, all those four sections or  
14 four groups were bound by a rubber band, and on top  
15 of that was a document with handwritten words "New  
16 Will Call Orders."

17 Does that help you understand what these  
18 particular documents are?

19 A. Yes. I would have to go through each one  
20 since they've been separated now but -- you know, I  
21 mean into groups, so I would have to --

22 Q. So we're not sure what the groups  
23 represent?

24 A. If they were together in this group with a  
25 rubber band around them with this note on top, that

1 would indicate Will Call Orders picked up by Native  
2 Wholesale at our dock since 8/13.

3 Q. We'll mark each of these groups. I don't  
4 know why they're separated into groups. They were  
5 separated by -- when I looked at -- when I got the  
6 box. So I assume that somebody at -- either  
7 Mr. Anderlik or --

8 A. Mr. Gomez.

9 MR. ECKHART: -- or Mr. Gomez separated  
10 them for some reason. But let's mark these just as  
11 group exhibits, the next four in order, and then  
12 we'll look at them individually.

13 (Whereupon Plaintiff's Exhibit Nos. 8 to 11  
14 were marked for identification.)

15 THE WITNESS: As an assumption -- but  
16 without being absolutely definitive -- but as an  
17 assumption, I would assume that Juan brought in  
18 groups of folders to be copied and that's why they  
19 were that way.

20 BY MR. ECKHART:

21 Q. I'm going to show you what's been marked as  
22 Plaintiff's Exhibit 8, and this is a series of  
23 documents, which is connected by a binder clip and  
24 do not appear to be otherwise -- they don't appear  
25 to be otherwise stapled together, but it's

1     apparently more than one invoice. The top invoice  
2     is marked is Number 10651 with a date of 9/4/2008.  
3     And there are in this -- yes, I think there's more  
4     than one invoice, also Invoice 10653; correct?

5     A. Yes.

6     Q. And Invoice 10654; correct?

7     A. That's correct. May I see that please?

8     Q. Certainly, certainly.

9     A. This group was from 9/4 and 9/5.

10    Q. Thank you. And those are at least --

11    A. Three.

12    Q. -- generally similar to that sample invoice  
13    that we looked at for the period after August 12th?

14    A. That is correct.

15    Q. I'll show you what's been marked as  
16    Plaintiff's Exhibit 9, which is a larger stack of  
17    invoices. The first invoice in this group is 10679;  
18    correct?

19    A. Correct.

20    Q. And the last one is 11012; correct?

21    A. I don't know if they're in consecutive  
22    order.

23    Q. But at least in the stack, it's the last  
24    one?

25    A. Yes.

1 Q. That's all I was -- so would you take a  
2 look at those and just verify basically what time  
3 period we are looking at.

4 A. 9/9, 9/10, 9/11, 9/12, 9/17, 9/18, 9/23,  
5 9/24; 25, another 25; 9/29, 10/6, 10/10, 10/14, and  
6 go down to the very last -- see, they're not in  
7 order. The last one is 11/10 -- I'm sorry -- 11/12.

8 Q. So these, at least, are invoices from  
9 September, October, and November of this year?

10 A. That is correct.

11 Q. Thank you.

12 And, again, these appear to be in terms of  
13 the documents that are within each invoice set, and  
14 they are similar to the invoices we looked at that  
15 was the example of an invoice after August 12th,  
16 2008; correct?

17 A. One more page here. Yes, with the  
18 exception of since 8/13, we have been adding a copy  
19 of the letter we received from the attorney for  
20 Native Wholesale, saying that they will only direct  
21 us to ship to Native Wholesale.

22 Q. Okay.

23 A. And that should be on all of them.

24 MR. ECKHART: Let's go ahead and, just so  
25 we have a separate -- you just referred to this

1 letter. Let me have this marked as --

2 (Discussion off the record.)

3 MR. ECKHART: Let's do these first. But I  
4 do have a copy of that letter which we'll mark  
5 separately so it's more easily identified then.

6 Q. Now I'm going to show you what's been  
7 marked as Plaintiff's Exhibit 10, which is also a  
8 binder-clipped series of invoices that say either  
9 Native Wholesale Supply or NWS in the top left-hand  
10 corner of the first page, which is the spreadsheet  
11 page.

12 And would you take a look at those and see  
13 if we can get at least a general idea of what time  
14 frame those invoices are for?

15 A. This one says 8/4 to this, prior. 8/4 then  
16 goes to 8/13.

17 Q. So let's look at that top invoice then and  
18 see, just for the purposes of consistency, as to  
19 where this particular shipment went.

20 A. Did you want to see it first?

21 Q. Well, at least hold it up so we can both  
22 kind of look at it. It indicates though on the  
23 second page, which is the Invoice/Bill of Lading,  
24 Native Nation document, all four of the boxes,  
25 Seller, Place of sale, Sold to purchaser, and Bill

1 to as Native Wholesale Supply; correct?

2 A. Correct.

3 Q. This would be then similar to that sample  
4 invoice we looked at initially; in other words, that  
5 it indicates that Native Wholesale Supply is picking  
6 this or will pick this product up at your dock?

7 A. That is correct. It will be called a Will  
8 Call, and that's why he's got that all together,  
9 even though it's a previous date.

10 Q. And, also, within this group of documents  
11 for this particular Invoice Number 10652 is a copy  
12 of the 8/14/2008, letter --

13 A. That's correct.

14 Q. -- from Mr. Violi, and there's also a  
15 tally-out sheet, which is what you indicated.

16 A. Correct. We do not send the paperwork back  
17 to Native until after we present it to Customs,  
18 which is on a weekly basis. They receive a disc  
19 with everything on it for that week.

20 Q. Now, on this particular document, this  
21 tally-out document, which is part of the group of  
22 documents that relates to Invoice Number 10652,  
23 there is a signature on this document as well. I  
24 assume that's the driver's signature again?

25 A. That is correct.

1 Q. And I don't know if this signature is  
2 clear. It does look like somebody named Benny, and  
3 starts with a D, Dryer or Dwyer?

4 A. It could be Bernie, Benny, Dennis. I  
5 wouldn't know.

6 Q. And then next to that is the word "Firm  
7 name."

8 A. Uh-huh.

9 Q. And then the initials would appear to be  
10 "APT" or "API," perhaps?

11 A. APT? It's probably a driver for that  
12 particular truck. Sometimes owner/operators will  
13 have their own identification.

14 Q. But that's not --

15 A. Not a common carrier.

16 Q. -- an acronym that you're familiar with?

17 A. Not that I'm familiar with.

18 MR. HANSEN: And if you'll notice on there,  
19 the tally-out, it wasn't shipped until September.  
20 So that may be why it's in this group. Even though  
21 the invoice date predates 8/13, it wasn't shipped  
22 until December.

23 MR. ECKHART: That's correct. The  
24 tally-out does show a 9/5/2008 date.

25 THE WITNESS: Thank you.

1 BY MR. ECKHART:

2 Q. And this particular tally-out was  
3 716 cases.

4 A. Had to to be a full trailer.

5 Q. And a full trailer would be a 40-foot  
6 trailer, probably?

7 A. It could be a 26-foot pup -- I'm sorry -- a  
8 27-foot pup, which is a single trailer unit that  
9 they usually do in doubles.

10 Q. And just one other question about this  
11 invoice, at the bottom of the first page which is,  
12 again, the copy of the spreadsheet that NITCO  
13 creates after receiving the Invoice/Bill of Lading,  
14 Native Nation document, there is handwritten a  
15 letter and a series of numbers, and on this one, it  
16 looks like W01-0581782-0.

17 A. I don't know what that number means. I  
18 probably should look at one of these pages though  
19 and see if it says entry number of -- it's an entry  
20 number. It's an entry number.

21 Q. And you picked up that from the  
22 Entry/Immediate Delivery document?

23 A. Right.

24 Q. Thank you. So it's another way of  
25 verifying that essentially this group of documents,



1 about five -- I think this is five pages -- all  
2 relate to the same shipment?

3 A. That is correct.

4 Q. They all have the same invoice number, and  
5 that number, at least the handwritten number at the  
6 bottom of the first page, corresponds to the number  
7 on the Customs' document at the end?

8 A. That is correct.

9 Q. Thank you. So I'm not sure, did we  
10 establish that this group of documents, which is  
11 marked as Plaintiff's Exhibit 10, relate to releases  
12 and entries -- I think I used the wrong word --  
13 entries during the month of August, 2008?

14 A. No. There was only one -- let me make sure  
15 it goes all the way back. Yes.

16 Q. Thank you. One more group. I'm showing  
17 you what's been marked as Plaintiff's Exhibit 11,  
18 which is also a binder-clipped series of entry  
19 documents, if I'm using -- am I using the correct  
20 word?

21 A. Yes, you are. Entry and release are  
22 simultaneous. You can use either one.

23 Q. And these, except for the last three in  
24 this group, appear to be also from August, 2008.  
25 The last three appear to be September.

1 Can you verify that, please.

2 A. I was just going to look at the shipping  
3 document. Again, they were shipped on 9/5 or after  
4 8/13. That's why this group is -- they weren't  
5 shipped out of our facility to Native Wholesale  
6 until after 8/13.

7 Q. Or at least this first one?

8 A. Yes.

9 Q. If that's the case.

10 This is the one that's on -- the first page  
11 is dated 8/4/2008, Invoice Number 10652 indicates it  
12 was shipped out -- the tally-out sheet shows it went  
13 out on September?

14 A. 5th.

15 Q. 5th. Okay.

16 And just so the record is clear, the other  
17 releases appear to be all after 8/13/2008. I think  
18 it's just that top one which is dated 8/4 and then  
19 the tally-out indicating it was released --

20 A. That is correct.

21 Q. -- in September.

22 Okay. And, again, these documents are  
23 similar to the example document which is -- I guess,  
24 for the record, I should remember which number that  
25 is.

1 MR. HANSEN: Seven.

2 BY MR. ECKHART:

3 Q. Number 7. So these are similar, therefore,  
4 to Plaintiff's Exhibit 7, which is a sample, and we  
5 went through in much detail of releases or entries  
6 after 8/13 or 8/12 -- actually, after 8/12 of 2008;  
7 correct?

8 A. That is correct.

9 Q. Now, this group of documents, which are now  
10 I think four exhibits -- 8, 9, 10, and 11, which  
11 we've just been talking about now -- are all  
12 releases of Native Wholesale product from your  
13 facility; is that correct?

14 A. To Native Wholesale at our dock, that is  
15 correct.

16 Q. Have you released -- do you know whether  
17 you've released Native Wholesale product at your  
18 dock to any common carriers?

19 A. No, not since that date.

20 Q. So as far as you know, there have been no  
21 shipments to California during that period of time?

22 A. None that I'm aware of.

23 Q. And no shipments to New Mexico during that  
24 time?

25 A. None.

1 Q. No shipments to Utah during that time?

2 A. None.

3 Q. No shipments to Washington?

4 A. None that I'm aware of.

5 Q. No shipments to Oklahoma?

6 A. None that I'm aware of.

7 And the reason I say that is because, once  
8 we received your letter and advised them, they told  
9 us they would go ahead and handle it from then on.  
10 So we would not be aware of where any shipments were  
11 going except to Native Wholesale.

12 Q. And then just one last state: No shipments  
13 to Idaho, as far as you know, since?

14 A. Not that I'm aware of.

15 MR. ECKHART: All right. Now, I would like  
16 to mark that letter that we've been referring to,  
17 Mr. Violi's letter of the 14th, as Plaintiff's next  
18 in order; and it's actually a two-page document  
19 because it's a fax cover sheet on the top.

20 (Whereupon Plaintiff's Exhibit No. 12 was  
21 marked for identification.)

22 BY MR. ECKHART:

23 Q. I'm showing you what's been marked as  
24 Plaintiff's Exhibit 12. And this appears to be a  
25 fax cover sheet from Mr. Violi's -- Leonard Violi

1 Law Offices in New York, and then a one page letter  
2 from Mr. Violi to you; correct?

3 A. That's correct.

4 Q. And what were the circumstances under which  
5 this letter was received?

6 A. When I received the Subpoena for the  
7 documents and your Subpoena stated that we had to,  
8 you know, indicate any shipments that went into  
9 California, we told them -- and you have a copy of  
10 my letter where I told Native Wholesale we would not  
11 be responsible to ship anything into the state of  
12 California.

13 Q. Now, you mentioned my Subpoena. I think  
14 maybe you're referring to --

15 A. Your document request.

16 MR. ECKHART: Let me have another document  
17 marked.

18 (Whereupon Plaintiff's Exhibit No. 13 was  
19 marked for identification.)

20 BY MR. ECKHART:

21 Q. I'm showing you what's been marked as  
22 Plaintiff's Exhibit 13, which is a letter from  
23 myself to you and Mr. Anderlik, I believe; correct?

24 A. That is correct.

25 Q. And is this the document that you're

1 referring to that prompted or was one of the reasons  
2 why Mr. Violi ended up sending his letter to you?

3 A. That is correct.

4 Q. So this was not specifically -- well, I  
5 just wanted to correct what I think was a  
6 misimpression. This letter, I don't believe was a  
7 document request, or maybe you might want to look at  
8 it and see. I mean it's basically, as I understand  
9 it, a letter asking you to no longer ship product to  
10 California.

11 A. I'm sorry. That was misnomer on my part.  
12 We received the document request previous to this  
13 one.

14 Q. So after you received my letter, which is  
15 Plaintiff's Exhibit 13, then what did you do?

16 A. I sent a letter to Native Wholesale and a  
17 letter to your office, advising that we intended to  
18 comply, and sent a letter to Native Wholesale  
19 stating that we would comply with your directive and  
20 would not ship anything to California, and they then  
21 wrote that letter to tell me they would not ask  
22 us -- they would only ship legally, and they would  
23 not ask us to ship any product; they would pick it  
24 up from then on.

25 Q. When you say "when they wrote the letter,"

1     you mean Mr. Violi wrote the letter?

2             A.     On behalf of Native Wholesale.

3                     (Whereupon Plaintiff's Exhibit No. 14 was  
4     marked for identification.)

5     BY MR. ECKHART:

6             Q.     Just for the purposes of completeness, I've  
7     had marked as Exhibit 14, a couple of letters. One  
8     is, I believe, the letter you were referring to that  
9     you wrote to me.

10            A.     That's correct.

11            Q.     And the letter -- the second page of this  
12     document is the letter that you wrote to  
13     Mr. Montour?

14            A.     That's correct.

15            Q.     And those are both dated the 14th of  
16     August?

17            A.     No. One is 13 and one 14.

18            Q.     The letter to Mr. Montour is dated the  
19     13th, and the letter to me is dated the 14th?

20            A.     Uh-huh.

21            Q.     Now, did you have any direct contact with  
22     Mr. Montour?

23            A.     No, I did not.

24            Q.     Have you had any direct contact with him  
25     since 8/14/2008?

1 A. No, I have not.

2 Q. Have any of the attorneys, besides  
3 Mr. Violi, contacted you about this matter?

4 A. No, they have not.

5 Q. You indicated that in each of the records  
6 that we've looked through that have been marked as  
7 Plaintiff's 8, 9, 10, and 11, those groups of  
8 invoices since that were released or entered after  
9 8/13/2008, that you've been including a copy of  
10 Mr. Violi's letter; correct?

11 A. That is correct.

12 Q. So you have not had any -- I take it you  
13 have not had any communication from either Native  
14 Wholesale or their attorneys about compliance with  
15 California law and/or any of the other states that  
16 have sent you letters asking that you not ship  
17 product to their states unless it complies with the  
18 laws of the states?

19 A. Only the same as I did with you to advise  
20 your office and their offices of our intent to  
21 comply and also advising Native Wholesale in each  
22 case that we intended to comply.

23 MR. ECKHART: Let's mark this as the next  
24 in order, please.

25 / / /



1 (Whereupon Plaintiff's Exhibit No. 15 was  
2 marked for identification.)

3 BY MR. ECKHART:

4 Q. I'm showing you a three-page document,  
5 which I'm going to put a paper clip on so we can  
6 keep it together.

7 A. I'm sorry. I couldn't hear you.

8 Q. I'm sorry. I just said I'll put a paper  
9 clip on this to keep the pages together. It's a  
10 three-page document which appear to be printouts of  
11 e-mails, and this appears to be a printout of an  
12 e-mail, or a series of e-mails that apparently you  
13 had with Mr. Violi; is that correct?

14 A. It appears to be, yes. Let me look. That  
15 is correct.

16 Q. Let me just take a look at it real quick.

17 Now, this relates though to the same  
18 subject of Mr. Violi's letter?

19 A. That is correct.

20 Q. In other words, circumstances under which  
21 you would release product that entered your facility  
22 from Native Wholesale and to any of the states,  
23 including California, that had asked you not to ship  
24 product that was not conforming with those states'  
25 laws; correct?

1 A. That is correct.

2 MR. ECKHART: Let's mark this one as the  
3 next in order.

4 (Whereupon Plaintiff's Exhibit No. 16 was  
5 marked for identification.)

6 BY MR. ECKHART:

7 Q. Showing you what's been marked as  
8 Plaintiff's Exhibit 16, this appears to be a  
9 memorandum from you to Mr. Violi, dated the -- I'm  
10 not finding a date.

11 A. I do that sometimes. I apologize.

12 Q. Okay. It reflects --

13 A. It isn't intended a test.

14 Q. The subject matter of the letter does  
15 reflect that you had received something from the  
16 Oklahoma --

17 A. I apologize. He shouldn't have put that in  
18 yours because yours was for California.

19 Q. But in any event, in any event, it does  
20 indicate that you had received some kind of request  
21 from the Oklahoma Attorney General's office?

22 A. That's correct. Oh, there's the date.

23 Q. 8/22/08. Okay. Thank you.

24 So at this point, we've already gone over  
25 this. So strike that. We don't have to go over

1 that same ground.

2 Let's review. Do you remember from which  
3 states you have received letters, similar to the one  
4 I wrote you, asking that you not -- I'm trying to --  
5 I'm searching for the right word here -- that there  
6 would be no shipments from the FTZ of Native  
7 Wholesale Supply product into California?

8 Have you received letters from other states  
9 besides California?

10 A. Yes, I have.

11 Q. And what states? Can you recall which ones  
12 you've received letters from?

13 A. I knew you were going to ask me that.

14 Q. Well, this last document we have --

15 A. It's Oklahoma.

16 Q. Maybe if you take a look at that, that will  
17 refresh your recollection.

18 A. Well, I know we have Oklahoma, Idaho,  
19 New Mexico, California, and Nevada we just received.

20 Q. So you have received a letter from Nevada?

21 A. Yes. I think I've got them all, didn't I?

22 Q. Prior to that time, my understanding was  
23 that into Nevada, that there was not a common  
24 carrier involved, but that the Paiute Tribe was  
25 picking up product at your facility?

1 A. That is correct. And they still do that.

2 Q. As far as New Mexico is concerned, they  
3 were using some kind of -- prior to receiving the  
4 letter from New Mexico, were shipments going out of  
5 the Foreign Trade Zone to New Mexico on common  
6 carrier?

7 A. I would have to check the records, to be  
8 honest with you. I believe they were, but I don't  
9 want to say definitely.

10 Q. Do you know of a business in New Mexico  
11 called Isleta, I-S-L-E-T-A, Wholesale?

12 A. I've heard the name.

13 Q. Does that refresh your recollection at all  
14 about shipments from the Foreign Trade Zone to  
15 New Mexico?

16 A. Again, I'm not sure of that particular  
17 company. I've heard the name. I know my people  
18 have discussed that company, but I don't know what  
19 it is. I could check it for you.

20 Q. That's fine. I'm just asking for your  
21 recollection at this point.

22 Are you aware that shipments from the  
23 Foreign Trade Zone, prior to your receipt of a  
24 similar letter from the State of Iowa, were going to  
25 a business called Warpath in Plummer, Idaho?

1           A.    Again, I don't know all of the consignee  
2 names. I know that they're going to tribal  
3 designations because we have pictures, and everyone  
4 has to originally have shown us that they were going  
5 to Indian Nations.

6           Q.    And where did that requirement come from?

7           A.    Our own internal.

8           Q.    "Internal" meaning at the Foreign Trade  
9 Zone?

10          A.    Yes.

11          Q.    And what was the reason for that?

12          A.    Initially, we were told that the shipments  
13 would come into the Foreign Trade Zone and then  
14 would be consigned to Indian Nation companies and/or  
15 representatives.

16          Q.    And who told you that?

17          A.    It was I had as a discussion right in the  
18 beginning when I had the information from Native  
19 Wholesale.

20          Q.    I see. Was that a telephone conversation  
21 or a letter or some kind of written communication?

22          A.    A visit to our facilities.

23          Q.    I see. And who visited from Native  
24 Wholesale?

25          A.    It was Arthur and another gentleman, but

1 I'm not sure who.

2 Q. When you say "Arthur," Arthur Montour?

3 A. That's correct.

4 Q. Did that take place before you signed the  
5 first lease agreement?

6 A. Before.

7 Q. Have they visited your facility since then?

8 A. Not to my knowledge. I'm sure that they  
9 have, but they would have seen our warehouse people.  
10 I did not see them. I'm out on the road most of the  
11 time.

12 Q. Did you personally meet with them when they  
13 came, before they signed the lease?

14 A. Yes, I did. One time.

15 Q. And was it that one time that you met with  
16 them when you got this understanding that the  
17 shipments would be going only to Native American  
18 tribes or to Native American businesses?

19 A. That is correct. We even took pictures of  
20 the cartons that came in that said "For reservation  
21 distribution only."

22 Q. And were you provided with anything in  
23 writing that reflected that that was going to be the  
24 case, or was it just an oral representation?

25 A. No. I don't believe so.

1 Q. And have you had any subsequent  
2 conversations or correspondence with Mr. Montour  
3 about this particular restriction on where the  
4 product was going? In other words, my understanding  
5 when I say "restriction," I mean that it was going  
6 only to Native American businesses or tribes?

7 A. No, I have not.

8 Q. Were you provided with any legal analysis  
9 or explanation as to why that restriction was  
10 imposed by Native Wholesale?

11 A. Only in discussions with the brokers that  
12 were releasing it.

13 Q. And what was the nature of those  
14 discussions?

15 A. General conversations.

16 Q. But, you know, generally what did they say  
17 about that, that that was the way it was, or were  
18 they telling you this was why it was that way?

19 A. I can't honestly remember.

20 Q. Okay. That's fair.

21 MR. HANSEN: Let me ask you this, for  
22 clarification. All of the cartons of cigarettes or  
23 the cases -- are they cases?

24 THE WITNESS: Cases.

25 MR. HANSEN: All the cases of cigarettes,

1 they're stamped on them "For reservation only"?

2 THE WITNESS: Did I give you copies of the  
3 pictures?

4 BY MR. ECKHART:

5 Q. I don't remember seeing them in the box,  
6 no.

7 A. Because I do have a set, thank goodness.  
8 Here's some more.

9 MR. ECKHART: Why don't we just mark these  
10 as a group.

11 (Whereupon Plaintiff's Exhibit No. 17 was  
12 marked for identification.)

13 BY MR. ECKHART:

14 Q. You've handed me a series of black and  
15 white, appear to be copies of photographs made on a  
16 copy machine; correct?

17 A. We actually go ahead and print them on  
18 line. We download them from our camera into the  
19 computer and then print them out for you.

20 Q. I see. And what you have on your camera is  
21 probably in color, but these are black and white?

22 A. No, it's actually black and white.

23 Q. And when were these photographs taken?

24 A. Some of them were taken, oh, probably  
25 August/September.



1 Q. Of this year?

2 A. Yeah.

3 Q. I see.

4 A. And then we had some old ones too, but they  
5 weren't good anymore. They'd been in the file too  
6 long. But that was when we first started talking  
7 about the fact that they were going to Indian tribes  
8 and Indian Nations, just different brands.

9 Q. And these were taken by your staff in your  
10 warehouse?

11 A. That is correct. And this shows where the  
12 shipper came from.

13 Q. Yes. You're showing me essentially the  
14 last page of this group of photographs, which is  
15 Grand River Enterprises Six Nations, Limited.

16 Thank you.

17 A. You're welcome.

18 MR. ECKHART: It is warm in here.  
19 Apologize for that. We'll have to talk to the  
20 management. I'm going to have these marked as a  
21 group.

22 (Whereupon Plaintiff's Exhibit No. 18 was  
23 marked for identification.)

24 BY MR. ECKHART:

25 Q. I'm showing you what's been marked as

1 Plaintiff's Exhibit 18, and it's a series of  
2 letters, first one being one to you from David  
3 Thompson, Nevada P.E., from the New Mexico Attorney  
4 General's Office, and then what appears to be a  
5 letter from you to Mr. Thompson.

6 A. That's correct.

7 Q. And the last document is a letter from you  
8 to Native Wholesale Supply.

9 A. That is correct.

10 Q. So would I be correct that these are copies  
11 of letters which you have seen or wrote?

12 A. Oh, yes.

13 Q. And this relates to shipments of Native  
14 Wholesale Supply product from the FTZ to New Mexico?

15 A. That is correct.

16 Q. How do you get paid for your services to  
17 Native Wholesale Supply?

18 A. We issue an invoice to them once a month.

19 Q. And how do they make payment?

20 A. Send us a check.

21 Q. And in terms of the invoice, do you fax it  
22 to them?

23 A. We fax and send via mail.

24 Q. And that's for storage and handling  
25 services and pursuant to the lease agreement that

1 you have with them?

2 A. That is correct.

3 Q. Do you know who signs the checks for them?

4 A. No, I don't.

5 Q. You didn't bring any of the checks with  
6 you?

7 A. No, I'm sorry. I didn't realize you would  
8 want those.

9 Q. That's all right.

10 A. I'll be glad to send you a copy.

11 Q. Certainly, if it's okay with your attorney?

12 A. (Indicating.)

13 Q. And that's a monthly billing?

14 A. That's correct.

15 Q. And do they pay on time?

16 A. Very much so.

17 Q. Do you know of the approximate amount on a  
18 monthly basis?

19 A. It varies probably between 8- and \$14,000  
20 per month.

21 Q. And has that amount increased over time?

22 A. Yes, it has.

23 Q. So the volume of their shipments has  
24 increased then? The volume of the product that is  
25 handled by your facility has increased?

1 A. Yes, it has. When we first started, we had  
2 500 square foot.

3 Q. Allocated to Native Wholesale product?

4 A. That is correct.

5 Q. And do you know the approximate square  
6 footage now that you allocate to that product?

7 A. Approximately 8,000 square foot.

8 Q. With regard to any of the shipments -- and  
9 I'm going to have you identify these in a moment --  
10 but any of the shipments that occurred prior to  
11 August 14th -- or was it August 12th? I forget.

12 A. August 12th.

13 Q. -- August 12th, 2008, do you recall  
14 receiving any instructions or communications of any  
15 kind from Big Sandy Rancheria?

16 A. I never have any communication with their  
17 clients.

18 Q. How about Huber Enterprise?

19 A. Never.

20 Q. Native Buy?

21 A. No.

22 Q. Black Hawk Tobacco?

23 A. No.

24 Q. So all communications that you have with  
25 the customer, Native Wholesale Supply, are with the

1 Customs or the carrier?

2 A. And U.S. Customs.

3 Q. Did you have any financial arrangement of  
4 any kind of with Big Sandy Rancheria, Huber  
5 Enterprise, Native Buy, or Black Hawk Tobacco?

6 A. Never.

7 Q. Let's go through these documents. You've  
8 also produced, pursuant to the request for  
9 production which was attached to the deposition --  
10 I'm sorry. I need to speak louder. I apologize.

11 You have also produced, pursuant to the  
12 request for documents, this series of entry or  
13 release documents relating to shipments that  
14 occurred prior to August 12th, 2008; correct?

15 A. That is correct.

16 MR. ECKHART: Now, I'm going to take these  
17 in groups as we did before. Ask the reporter to  
18 mark these as next in order.

19 (Whereupon Plaintiff's Exhibit No. 19 was  
20 marked for identification.)

21 BY MR. ECKHART:

22 Q. I'm showing you what's been marked as  
23 Plaintiff's Exhibit 19. And that is, again, a  
24 series of documents that has a small piece of paper  
25 attached under the binder clip that says "2004

1 Native Made Tobacco"; correct?

2 A. That's correct.

3 Q. And this document begins with Invoice  
4 Number 4988; March 31, 2004. And the name on the  
5 spreadsheet document, for want of a better term, the  
6 first document here is Turtle Island Enterprise.

7 Do you know where Turtle Island Enterprise  
8 is located?

9 A. I don't personally know.

10 Q. Maybe there's another document in here  
11 which will help --

12 A. But I know what's on the documents.

13 Q. -- us understand that. So let's look at --  
14 in this instance, which is the third document  
15 regarding this invoice, the second document looks  
16 like a fax cover sheet; is that correct?

17 A. Yeah.

18 Q. Now, the third document is one of these  
19 Native Invoice/Bill of Lading, Native Nation  
20 documents we looked at before.

21 A. That's correct.

22 Q. Now, this one, again relating to Invoice  
23 Number 4988, indicates Native Wholesale Supply as  
24 the Seller and as the Place of Sale. The Sold to  
25 Purchaser is Turtle Island Enterprise, apparently in

1 New Mexico; is that correct?

2 A. That is correct.

3 Q. And that's also the "Billed to" entry on  
4 this document?

5 A. Yes.

6 Q. Again, just for clarity, this is a document  
7 prepared by Native Wholesale that you receive; the  
8 printed portion of the document is all prepared by  
9 Native Wholesale?

10 A. That is correct.

11 Q. And the handwritten entries are entered by  
12 your staff?

13 A. That is correct. In this case, we just  
14 went over it for clarification.

15 Q. Now, looking at the second page of this  
16 document, which we said was a fax cover sheet, but  
17 it apparently contains a little more information  
18 than just a to and from. It indicates several lines  
19 of information, one of which is something called  
20 Transport, and on that line, it says --

21 Can you read that?

22 A. "Self, Native Made Tobacco." So in other  
23 words, they sent in their own truck to pick it up.

24 Q. I see. And is it your understanding that  
25 Native Made Tobacco is a business located in

1 California?

2 A. No. I don't really know. I just know it's  
3 in New Mexico.

4 Q. Well, Turtle Island Enterprise is located  
5 in New Mexico?

6 A. Uh-huh.

7 Q. So what we're trying to figure out is where  
8 Native Made Tobacco is.

9 A. We can look at the Bill of Lading. That  
10 would probably be easier.

11 Q. Let's look at the Bill of Lading. It  
12 indicates -- and this is not Con-Way.

13 A. It's California, uh-huh.

14 Q. And you're indicating that this document,  
15 the Bill of Lading, which again is a document, the  
16 handwritten entries are prepared by your staff?

17 A. That's correct.

18 Q. Indicates Native Made Tobacco as the  
19 Consignee and an address in Palm Springs,  
20 California?

21 A. That's correct.

22 Q. So that's why these documents with the  
23 cover note Native Made Tobacco were produced by you  
24 pursuant to the document request?

25 A. That is correct.



1 Q. Because these were shipments into  
2 California?

3 A. Yes. I'm sorry.

4 Q. And, again, these documents were -- you  
5 know, they are similar to the exemplar document we  
6 looked at in detail earlier relating to entries or  
7 releases that occurred prior to August 12th, 2008?

8 A. Right.

9 Q. And as far as you know, all the ones in  
10 here, because of this notation on the front, relate  
11 to Native Made Tobacco or that was the Consignee,  
12 meaning where they were shipped to?

13 A. That's what I would assume, since the note  
14 is on there, but I did not go through every single  
15 page. My clerical staff did when they copied them  
16 for you.

17 Q. But these are documents out of your files?

18 A. Yes.

19 Q. And I'm just kind of paging through them  
20 quickly. Most of them appear to have the words on  
21 the first page -- I'll show you an example here.  
22 We'll look at this page, which is Invoice Number  
23 5418, does say the words in handwriting "Native Made  
24 Tobacco."

25 A. That is correct.

1 Q. So as far as you know, these were  
2 accurately pulled from your records and copied for  
3 this deposition?

4 A. Yes, definitely.

5 Q. Thank you. The next group --

6 A. They're actually duplicates of all the  
7 copies we would have sent to U.S. Customs, so they  
8 have to be accurate.

9 MR. ECKHART: I'm going to have this marked  
10 as the next group.

11 (Whereupon Plaintiff's Exhibit No. 20 was  
12 marked for identification.)

13 BY MR. ECKHART:

14 Q. Now, I'm showing you what's been marked as  
15 Exhibit 20. The top document is an Invoice 56 -- I  
16 can't quite read that -- 5628. It bears the printed  
17 initials NWS and then the words in handwriting  
18 printed "Native Made Tobacco."

19 A. That's correct.

20 Q. And so this would appear to be -- and this  
21 first one is dated 2005, and I believe there's one  
22 from 2006. The others all appear to be 2005. So  
23 these all appear to be invoices and/or entry  
24 documents relating to shipments to Native by -- or  
25 Native Made Tobacco, excuse me -- during 2005,

1     except perhaps for this last one, which looks like  
2     it's 2006.

3           A.     That is correct. But I do want to make one  
4     clarification. The terms that you're using "entry"  
5     and "withdrawal releases," they all have separate  
6     meanings. An "entry" is the documents that Customs  
7     approves that gives us the right to go ahead and  
8     release the merchandise. So we actually release it  
9     on receipt of the entry document.

10           And when we pull the order, we're going to  
11     a withdrawal. We're withdrawing product. So that's  
12     where those three terms are, just for clarification.

13           Q.     Okay. So more accurately then would be to  
14     describe these as release documents?

15           A.     That is correct.

16           Q.     Because that's what the Foreign Trade Zone  
17     is doing at this point; you are releasing them from  
18     your facility?

19           A.     That is correct.

20           (Whereupon Plaintiff's Exhibit No. 21 was  
21     marked for identification.)

22     BY MR. ECKHART:

23           Q.     I guess we'll keep these with the  
24     designations. So Plaintiff's Exhibit 21 has a small  
25     note on the top, "Huber, 2005."

1 A. Correct.

2 Q. Do you see that?

3 And do you know that "Huber" refers to  
4 Huber Enterprise?

5 A. That is correct.

6 Q. And that is a business located in  
7 California; is that correct?

8 A. That is correct.

9 Q. So as far as you know, these were pulled at  
10 your direction by your staff, pursuant to the  
11 document request relating to shipments to Huber  
12 Enterprise?

13 A. That is correct.

14 Q. So this is 2005. And the first invoice is  
15 5843, dated April 27, 2005 -- and whoops, well,  
16 there's a 2006 in here, so they're not all 2005 but  
17 another 2006. So these are actually from a couple  
18 of -- from 2005 and apparently some from 2006.  
19 There's about -- my guess is there's about six or  
20 seven of them.

21 And, again, those were prepared by your  
22 staff and are similar to the exemplar we looked at  
23 before, for shipments before August 12th, 2008?

24 A. Prepared by Native Wholesale, our staff,  
25 and the Custom broker, Gene Mack.

1 (Whereupon Plaintiff's Exhibit No. 22 was  
2 marked for identification.)

3 BY MR. ECKHART:

4 Q. Exhibit 22 is just two invoices with a  
5 notation on the front "2006, Huber." And, again, I  
6 think both of these do bear dates of 2006.

7 A. Correct.

8 MR. ECKHART: And Exhibit 23.

9 (Whereupon Plaintiff's Exhibit No. 23 was  
10 marked for identification.)

11 THE WITNESS: You're a good stacker-upper.

12 MR. HANSEN: A guy's got to have skill.

13 BY MR. ECKHART:

14 Q. Exhibit 23, again, has a handwritten note  
15 on the top, a small handwritten note that says  
16 "2007, Huber," and this appears to be documents  
17 stapled together all bearing dates in 2007. So  
18 these are invoices similar to the ones that we  
19 looked at more carefully for prior to August 12th,  
20 2008.

21 A. That's correct.

22 (Whereupon Plaintiff's Exhibit No. 24 was  
23 marked for identification.)

24 BY MR. ECKHART:

25 Q. And the last group relating to Huber is

1 Plaintiff's 24 that says "2008, Huber." When these  
2 documents say "Huber," is it your understanding that  
3 that means that that was the Consignee, in other  
4 words, the entity that received the documents?

5 MR. HANSEN: The product.

6 BY MR. ECKHART:

7 Q. The product, excuse me, yeah, the product,  
8 the cigarettes?

9 A. Yes. Either that, or it says Big Sandy.  
10 They may have used both names.

11 Q. Well, this particular invoice --

12 A. Does say Huber.

13 Q. -- 9332 on the spreadsheet document says  
14 Huber Enterprise.

15 A. Uh-huh.

16 Q. The Invoice/Bill of Lading, Native Nation  
17 document -- whoops, I'm going to have to unclip  
18 them.

19 A. The Native Wholesale document.

20 Q. Yes, the Native Wholesale document --

21 A. Big Sandy.

22 Q. -- indicates that the Purchaser and Bill to  
23 is Big Sandy Rancheria.

24 A. That's correct.

25 Q. But then if we look at the Bill of Lading,

1     it indicates Huber Enterprise.

2           A.     Uh-huh.

3           MR. HANSEN:   Is that a "yes"?

4     BY MR. ECKHART:

5           Q.     You have to say "yes" or verbal answers.

6           A.     Uh-huh.   I thought I did.   I'm sorry.

7           Q.     You'd be surprised how often she has to  
8     type that in.

9           A.     Yes.

10          Q.     So these are, again, invoices apparently  
11     reflecting shipments prior to August 12th of 2008.  
12     They're listed as 2008, but they do not include  
13     shipments after -- it looks like the last one,  
14     assuming these are in chronological order, is  
15     August 7th?

16          A.     That's correct.

17          Q.     And the first one is January 15th, this  
18     year.

19          A.     Okay.

20          MR. HANSEN:   Where the shipping consignee  
21     is Huber.

22          MR. ECKHART:   Where the shipping consignee  
23     is Huber, correct.

24          MR. HANSEN:   Because there's a consignee  
25     note on the --

1 MR. ECKHART: Customs' document.

2 MR. HANSEN: -- Customs' document that may  
3 not be the same.

4 MR. ECKHART: Well, let's --

5 THE WITNESS: They say "Native Wholesale."

6 BY MR. ECKHART:

7 Q. We went through that earlier, and there's  
8 slightly different terminology; correct?

9 A. That's correct.

10 Q. That the Customs' document says "Ultimate  
11 Consignee."

12 A. Right. Because they refer to the importer  
13 of record.

14 Q. "Ultimate" meaning last, for instance?

15 A. The last, as far as Customs is concerned.

16 Q. Customs doesn't care whether Huber  
17 Enterprise or Big Sandy gets it; right?

18 A. Well, they care, but they want to make sure  
19 that what we're showing them is accurate.

20 Wow.

21 Q. That's why it's nice that there are only  
22 actually five binder clips, and I think we're down  
23 to the last. Actually, we may need to go in this  
24 order, if we do it chronologically reversed, maybe  
25 this one first.



1 MR. ECKHART: This is 25.

2 (Whereupon Plaintiff's Exhibit No. 25 was  
3 marked for identification.)

4 BY MR. ECKHART:

5 Q. 25 has a little note on the front, "Big  
6 Sandy, 2003," and it's a single a record of a single  
7 release.

8 A. That's correct.

9 Q. In December of 2003.

10 A. For clarification, initially, this is how  
11 we did it from them. We received this (indicating)  
12 with their invoice behind it.

13 Q. And by "this," you mean the second page?

14 A. The second page, which is different than  
15 the other ones you have in there. But this was  
16 their original format, and because of paper  
17 conservation, they cut down on paper.

18 Q. And just went to the single?

19 A. Invoice/Bill of Lading.

20 Q. Invoice/Bill of Lading, okay.

21 And to go back to my earlier questions,  
22 that particular document, Exhibit 25, you don't have  
23 any similar documents from any period of time  
24 earlier than that, as far as you know?

25 A. Not to my knowledge.

1 Q. Customs would have records of releases  
2 prior to that?

3 A. They certainly should; but I can't, you  
4 know, tell you exactly what they have or where they  
5 might store them.

6 Q. Of the documents that make up -- or of the  
7 pages that make up that particular set of documents  
8 for that particular shipment in December of 2003,  
9 what of those documents do you understand Customs  
10 would have?

11 A. The only thing they would have would be the  
12 entry paper, Bill of Lading, that one right there.

13 Q. That's the document prepared by Gene Mack?

14 A. Yes. And Gene Mack may also have them.

15 MR. HANSEN: And Gene Mack may have your  
16 spreadsheet, if they kept it.

17 THE WITNESS: If they kept it.

18 MR. HANSEN: Because you provided a copy of  
19 that to them.

20 THE WITNESS: Correct. But Customs  
21 requires three years on that type of documentation,  
22 seven years on anything that's invoices; or anything  
23 that shows their Customs' designation on it has to  
24 be kept for a minimum of forever.

25 / / /

1 (Whereupon Plaintiff's Exhibit No. 26 was  
2 marked for identification.)

3 BY MR. ECKHART:

4 Q. Showing you what's been marked as  
5 Plaintiff's Exhibit 26, it bears a small note on the  
6 front that says, "Big Sandy, 2004." And is it your  
7 understanding that this group of documents  
8 represents releases from the FTZ to Big Sandy for  
9 2004?

10 A. That's a fat one. Yes, it is.

11 Q. Thank you. And, again, those are similar  
12 in characteristic with that slight change in the  
13 paper reduction change that occurred, if there may  
14 be some that have two page --

15 A. That's correct.

16 Q. -- document received from Native Wholesale  
17 Supply, which is the Invoice/Bill of Lading, Native  
18 Nation document, as well as what we call a fax cover  
19 sheet, for want of a better term.

20 A. There may be some of them.

21 (Whereupon Plaintiff's Exhibit No. 27 was  
22 marked for identification.)

23 BY MR. ECKHART:

24 Q. I'm showing you Exhibit 27, which is again  
25 a series of release documents that have a small note

1 on the top that say "2005, Big Sandy."

2 Do those appear to be records of releases  
3 from the Foreign Trade Zone to Big Sandy during  
4 2005?

5 A. There's one here, yes. Yes.

6 Q. And, again, prepared in similar ways to the  
7 way the documents were prepared as we looked at that  
8 sample --

9 A. That's correct.

10 Q. -- prior to August 12th, 2008?

11 (Whereupon Plaintiff's Exhibit No. 28 was  
12 marked for identification.)

13 BY MR. ECKHART:

14 Q. And this is 2006. I'm showing you a stack  
15 of documents held together with a binder clip that  
16 has a small note on the top that says "2006, Big  
17 Sandy."

18 A. There's also a 2005 in here, another 2005,  
19 2005. That's three.

20 Q. So with the exception of those three?

21 A. There's three 2005. The balance are 2006.

22 Q. And, again, those were prepared and  
23 maintained by your facility in the same way of that  
24 sample that we talked about earlier?

25 A. That's correct.

1 MR. ECKHART: Let's just go ahead and mark  
2 the 2007 set as Plaintiff's Exhibit 29, and this has  
3 a notation on the front "Big Sandy, 2007."

4 (Whereupon Plaintiff's Exhibit No. 29 was  
5 marked for identification.)

6 THE WITNESS: I think it's important to  
7 note though, for clarification, that sometimes if a  
8 shipment is not made based on a release until the  
9 following year, it could have very easily got into  
10 the other pile. That's what would have caused that.

11 BY MR. ECKHART:

12 Q. But Exhibit 27 -- or 29, excuse me.

13 A. Is all 2007.

14 Q. And, again, prepared and maintained in the  
15 same way that you prepared and maintained -- to the  
16 extent that you prepared documents that are part of  
17 those, or that you received them, and they were  
18 prepared by the Customs' broker, Native Wholesale,  
19 they're very similar to the documents you've looked  
20 at before?

21 A. Correct.

22 MR. ECKHART: And then just to complete the  
23 last set of 2008, Big Sandy, which is marked as  
24 Plaintiff's Exhibit 30.

25 / / /

1 (Whereupon Plaintiff's Exhibit No. 30 was  
2 marked for identification.)

3 BY MR. ECKHART:

4 Q. Again, this is prior to August 12th, 2008.

5 A. Correct.

6 Q. I'd like the record to reflect that, in  
7 each instance -- and I'll ask you the question  
8 specifically -- in each instance, the last several  
9 groups of documents we talked about, you've paged  
10 through and looked to see if they were from that  
11 year that is indicated on the top; is that correct?

12 A. That is correct.

13 Q. And, again, with regard to Plaintiff's  
14 Exhibit 30, which is the 2008 Big Sandy releases,  
15 again, these documents are similar to the documents  
16 that we looked at in detail earlier on, prepared or  
17 received by the Foreign Trade Zone prior to  
18 August 12th, 2008?

19 A. That is correct.

20 Q. Do any of your records, with regard to your  
21 dealings with Native Wholesale, indicate the  
22 ownership of the product when it is in the Foreign  
23 Trade Zone?

24 A. Everything I have reflects Native Wholesale  
25 Supply.

1 Q. So as far as you know, Native Wholesale  
2 Supply is the owner?

3 A. That is correct. To the best of my  
4 knowledge.

5 Q. You indicated before that I didn't ask for  
6 documents relating to the entry of product into the  
7 Foreign Trade Zone; correct?

8 A. That's correct.

9 Q. Is it your understanding -- or what is your  
10 understanding regarding the volume of product  
11 entering the Foreign Trade Zone now versus what it  
12 was before August 12th, 2008?

13 A. Again, I would have to just give you a  
14 guesstimate. I can't give you an accurate figure  
15 because I don't have that with me. But to the best  
16 of my knowledge, it has gone down. I cannot tell  
17 you how much though. It has definitely depreciated.

18 Q. In terms of the amount of inventory you  
19 have on hand, can you give me a rough estimate of  
20 how many square feet of the 800 -- I think you said  
21 80,000?

22 A. 8,000.

23 Q. 8,000, excuse me. I'm sorry.

24 A. I would love to have 80,000 if you can find  
25 me another client.

1 Q. Is the inventory less now than it was  
2 before August 12th, 2008?

3 A. It varies through the year anyway. But I  
4 would say it is down slightly, not considerably.

5 Q. Do you know what trucking company or common  
6 carrier is being used by Native Wholesale to ship  
7 product into the Foreign Trade Zone?

8 A. Usually, its owner/operators, but I  
9 couldn't tell you which one in particular.

10 Q. I know I saw some, I thought, some J.E.  
11 Walker bills of lading.

12 A. Yes, uh-huh.

13 Q. But that's apparently not exclusive in your  
14 understanding?

15 A. No, no. With most of my customers,  
16 economics dictates who they use.

17 Q. The cheaper, the better?

18 A. As long as the service is good.

19 Q. If there were some kind of damage to  
20 products while it's within the Foreign Trade Zone,  
21 whose responsibility is that?

22 A. It depends on if we determined that it's  
23 damaged at the time we receive it on the -- you  
24 know, when it comes in on the entry, then of course  
25 that would be the carrier's responsibility.



1           If, let's say, something happened where  
2 something got wet or forklift pulled through it,  
3 that would be our responsibility. And the main  
4 responsibility is to make sure we report to Customs  
5 that it is short because of the damage. We have  
6 never had a damage for Native though that we've had  
7 to pay.

8           Q.   Let me just double-check here. I think  
9 we're done.

10           Do you deal with a Customs' office here in  
11 Las Vegas?

12           A.   Yes, we do.

13           Q.   And if you were trying to get documents  
14 from Customs particularly, for instance, relating to  
15 the period of time before December 29th, 2003, would  
16 you go to the local office first?

17           A.   Before 2003? I honestly can't tell you if  
18 they would have maintained them here or down there.

19           Q.   What do you mean "down there"?

20           A.   In L.A., for the district.

21           Q.   I see. Is there any particular person that  
22 you deal with at Customs?

23           A.   Inspector Farr, F-A-R-R, or Inspector  
24 Fuller, F-U-L-L-E-R.

25           MR. HANSEN: Can I get a copy without all

1 the exhibits?

2 THE REPORTER: Certainly.

3 BY MR. ECKHART:

4 Q. With the exception of the invoices that you  
5 send to Native Wholesale on a monthly basis and the  
6 checks that they send you, are there any other  
7 documents that you have relating to your  
8 relationship with Native Wholesale?

9 A. Not to my knowledge, no.

10 Q. I mean I didn't specifically ask you for  
11 invoices, but I think I intended to get, under the  
12 document production request, all contracts or  
13 agreements or documents relating to such contracts  
14 or agreements for storage, handling, receipt or  
15 shipment.

16 So I'm just wondering if there is a  
17 payment -- and I don't necessarily need every  
18 invoice. What I'm thinking is do you have any kind  
19 of summary payment records relating to this  
20 particular customer such that would display payments  
21 over a period of time, say a spreadsheet or  
22 something like that that you can produce?

23 A. Yes, I do.

24 MR. ECKHART: Can I ask you to provide  
25 that? I mean I'm not sure what the proper protocol

1 is. Can it be provided to the court reporter as an  
2 additional exhibit to the deposition? Is there some  
3 way we can do that?

4 Or I need something from her that indicates  
5 that it's a record that we talked about at the  
6 deposition that she didn't produce because I didn't  
7 specifically ask for it.

8 MR. HANSEN: Yeah, we can provide that as  
9 the next-in-order exhibit. The summary.

10 THE WITNESS: Now, would you only want that  
11 for, say, a year for record purposes or review  
12 purposes? Because I can't tell you how far back I  
13 can go on that. But I do know I can give you the  
14 last -- our records for Customs are three years on  
15 account payables and receivables, so probably not  
16 more than three years, if that would be adequate.

17 BY MR. ECKHART:

18 Q. That would be fine if you can produce that,  
19 and then if I could get one of your invoices, and I  
20 assume you keep copies of the checks or some kind of  
21 record of the payment?

22 A. It would be on that spreadsheet that I  
23 would send you.

24 MR. ECKHART: The reason I ask for a copy  
25 of the check, I would like to know who's signing the

1 checks, at least for at the present time.

2 MR. HANSEN: So you're looking for like an  
3 exemplar invoice and --

4 MR. ECKHART: An exemplar invoice and  
5 exemplar check.

6 MR. HANSEN: -- and an exemplar of payment.

7 THE WITNESS: I don't think I would have a  
8 copy of their check, unless I got a current one;  
9 mainly because of the fact, when we get it in, it's  
10 entered into the computer, and then it is deposited  
11 in the bank, and all we show is that NWS, so much  
12 amount, and the check number. We wouldn't show a  
13 copy of the check.

14 BY MR. ECKHART:

15 Q. Well, I can ask Native Wholesale for that  
16 then. But if you could give me an exemplar invoice,  
17 however, I would appreciate that too, that and the  
18 spreadsheet indicating the payment record over the  
19 last period, for what period of time you have. You  
20 said three years probably, and that would be fine.  
21 If that could just be directly -- you can provide it  
22 to your attorney, and then he can get it to the  
23 reporter, and we can make that Exhibit 31.

24 THE WITNESS: Any objection to that?

25 MR. HANSEN: That would be fine.

1 MR. ECKHART: We'll make that Exhibit 31.

2 I think we're concluded unless your  
3 attorney --

4 MR. HANSEN: That's fine. And then as far  
5 as the reading of the transcript, forward it to me,  
6 because I am ordering a copy, and then I'll provide  
7 it to my client for signing.

8 MR. ECKHART: And there is -- essentially  
9 she has 30 days to read and make corrections and  
10 sign; is that correct?

11 MR. HANSEN: I think it's 30 days.

12 THE WITNESS: I think you know that we  
13 usually respond immediately.

14 MR. ECKHART: Yes. I would ask, if at  
15 all -- you know, just a courtesy -- and I do  
16 appreciate your quick response in the past, but if  
17 you could give this a priority simply because I have  
18 some upcoming court dates, and this information I  
19 would like to be able to use it for those for court  
20 hearings in mid-January, and I assume that that will  
21 be fine with your schedule.

22 Thank you very much. Appreciate your time,  
23 Ms. Tornberg.

24 THE WITNESS: Thank you.  
25

1 (The deposition concluded at 3:30 p.m.)

2 -oOo-

3  
4 (Whereupon Plaintiff's Exhibit No. 31 was  
5 received and marked on December 1st, 2008, for  
6 identification.)  
7  
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## CERTIFICATE OF DEPONENT

PAGE	LINE	CHANGE	REASON
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\* \* \* \* \*

I, JO ANNE TORNBURG, deponent herein, do hereby  
certify and declare the within and foregoing  
transcription to be my deposition in said action;  
under penalty of perjury; that I have read,  
corrected and do hereby affix my signature to said  
deposition.

JO ANNE TORNBURG, Deponent	Date
----------------------------	------

CERTIFICATE OF REPORTER

[illegible]

I, Dana J. Tavaglione, a duly commissioned and licensed Court Reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, Jo Anne Tornberg commencing on Thursday, November 20, 2008, at 1:05 P.M.

That prior to being examined, the witness was, by me, duly sworn to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action.

IN WITNESS HEREOF, I have hereunto set my hand,  
in my office, in the County of Clark, State of  
Nevada, this 3rd day of December, 2008.

Dana J. Tavaglione  
DANA J. TAVAGLIONE, CCR NO. 841



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STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

August 14, 2008

*Via Facsimile to (702) 361-1446 and  
Certified Mail, Return Receipt Requested*

JoAnne Tornberg  
President  
Nevada International Trade Corporation  
Foreign Trade Zone # 89  
P.O. Box 98076  
Las Vegas, NV 89119

Bob Anderlik  
Vice President, Client Services  
Nevada International Trade Corporation  
Foreign Trade Zone # 89  
P.O. Box 98076  
Las Vegas, NV 89119

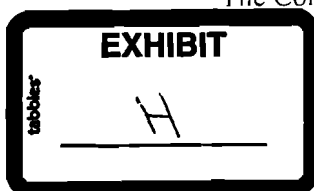
*RE: State of Idaho v. Native Wholesale Supply Company*

Dear Ms. Tornberg and Mr. Anderlik:

Today, the State of Idaho and the Idaho State Tax Commission filed suit against Native Wholesale Supply (NWS) regarding NWS' shipments of millions of non-compliant, contraband cigarettes into the state of Idaho, in violation of Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act)<sup>1</sup> and the cigarette tax laws found in Chapter 25, Title 63, Idaho Code. The Complementary Act prohibits, in part, the sale of cigarettes into Idaho that are not certified for sale by the Idaho Attorney General, pursuant to the provisions of the Complementary Act. I have enclosed a courtesy copy of the Complaint filed against NWS.

We appreciate the cooperation and assistance during our initial investigation shown by the Nevada International Trade Corporation dba Foreign Trade Zone #89 (NV FTZ). However, we remain concerned that despite NWS receiving notice of its violations of Idaho's laws on June

<sup>1</sup> The Complementary Act, as amended, is codified at Title 39, Chapter 84, Idaho Code.



Consumer Protection Division  
Len B. Jordan Building, Lower Level, P.O. Box 83720, Boise, Idaho 83720-0010  
Telephone: (208) 334-2424, FAX: (208) 334-4151  
(800) 432-3545, Toll Free in Idaho; TDD Accessible

000373  
IDAG152058

JoAnne Tornberg  
Bob Anderlik  
August 14, 2008  
Page 2 of 2

10, 2008, NWS proceeded to direct two subsequent shipments of non-compliant cigarettes into Idaho on June 12, 2008, and July 21, 2008.

We respectfully request that the NV FTZ immediately cease facilitating the release and shipment of cigarettes of non-compliant manufacturers and brands to Idaho. Section 3(c) of the Complementary Act provides that it is unlawful:

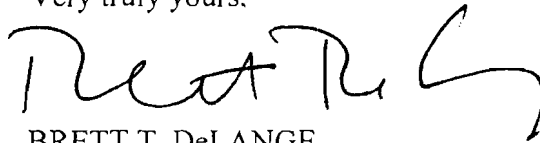
To acquire, hold, own, possess, transport, import, **or cause to be imported** cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of this subsection (3). (Emphasis added.)

We believe that the NV FTZ may be in violation of the provisions of this section by releasing shipments of non-compliant cigarettes into Idaho. NV FTZ's actions in facilitating these shipments may also constitute aiding and abetting in the shipment of contraband product without the proper reporting and taxing required by law of the cigarette manufacturer.

We sincerely hope that the NV FTZ will immediately cease facilitating the shipment of contraband cigarettes into Idaho. The Idaho Attorney General maintains a Directory of Compliant Tobacco Manufacturers and Brand Families on our web site at <http://www2.state.id.us/ag/consumer/tobacco.htm> that will assist you in determining if a brand is compliant.

Your immediate attention to this matter is appreciated. Please feel free to call me if you wish to discuss this matter.

Very truly yours,



BRETT T. DeLANGE  
Deputy Attorney General  
Consumer Protection Division

Enclosure

000374  
IDAG152059

\* \* \* COMMUNICATION RESULT REPORT ( AUG. 14. 2008 12:56PM ) \* \* \*

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E-4) NO FACSIMILE CONNECTION

## STATE OF IDAHO



## OFFICE OF THE ATTORNEY GENERAL

P.O. Box 83720

650 W. State St., Len B. Jordan Bldg., Lower Level

Boise, ID 83720-0010

Phone: (208) 334-2424

## FAX TRANSMISSION

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**1. Article Addressed to:**

Joanne Tornberg, President  
Nevada International Trade Corp.  
Foreign Trade Zone #89  
P.O. Box 98076  
Las Vegas NV 89119

**2. Article**

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PS Form 3800, June 2002 <span style="float: right;">See Reverse for Instructions</span>	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY										
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<table border="1"> <tr> <td>A. Received by (Please Print Clearly) <i>Robert Anderlik</i></td> <td>B. Date of Delivery 8/15/08</td> </tr> <tr> <td colspan="2">C. Signature <i>[Signature]</i></td> </tr> <tr> <td colspan="2"> <input type="checkbox"/> Agent  <input type="checkbox"/> Addressee         </td> </tr> <tr> <td colspan="2">           D. Is delivery address different from item 1?            If YES, enter delivery address below:         </td> </tr> <tr> <td colspan="2"> <input type="checkbox"/> Yes  <input type="checkbox"/> No         </td> </tr> </table>	A. Received by (Please Print Clearly) <i>Robert Anderlik</i>	B. Date of Delivery 8/15/08	C. Signature <i>[Signature]</i>		<input type="checkbox"/> Agent <input type="checkbox"/> Addressee		D. Is delivery address different from item 1? If YES, enter delivery address below:		<input type="checkbox"/> Yes <input type="checkbox"/> No	
A. Received by (Please Print Clearly) <i>Robert Anderlik</i>	B. Date of Delivery 8/15/08										
C. Signature <i>[Signature]</i>											
<input type="checkbox"/> Agent <input type="checkbox"/> Addressee											
D. Is delivery address different from item 1? If YES, enter delivery address below:											
<input type="checkbox"/> Yes <input type="checkbox"/> No											
1. Article Addressed to: Bob Anderlik, Vice-President Client Services Nevada International Trade Corp. Foreign Trade Zone #89 P.O. Box 98076 Las Vegas NV 89119	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.										
2. Article Number 7003 0500 0001 5167 2799	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes										

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

IDAG152062

8/19/2008  
NWS  
INV 10552

Nevada F.T.Z. Warehouse Withdrawal

Item #	Seneca 60's	Zone # 1020	Zone # 1021	Zone # 1022	Zone # 1023	Zone # 1024	Zone # 1025	Zone # 1026	Zone # 1027	Total
11054	Full Flavor S/P King	6								6
11060	Full Flavor H/L King					17	18			35
11061	Light H/L King					7				7
11065	Non-Filter H/L King			3						3
11066	Full Flavor S/P 100					15				15
11067	Light S/P 100								10	10
11068	Ultra Lt S/P 100					7				7
11069	Menthol S/P 100			8						8
11070	Menthol Lt S/P 100		5							5
11072	Full Flavor H/L 100						18	17		35
11073	Light H/L 100						15			15
11074	Ultra Lt H/L 100				7		8			15
11075	Menthol H/L 100					5		3		8
11076	Menthol Light H/L 100		4							4
11077	Menthol Ult H/L 100					5				5
Total		6	9	11	7	56	59	20	10	178
Item #	Opal 30's	Zone # 1020	Zone # 1021	Zone # 1022	Zone # 1023	Zone # 1024	Zone # 1025	Zone # 1026	Zone # 1027	Total
33133	Menthol H/L 120					5				5
Total		0	0	0	0	5	0	0	0	5

Zone Totals

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1020	1021	1022	1023	1024	1025	1026	1027		
6	9	11	7	61	59	20	10		183

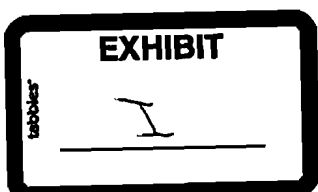
Opal 30's  
Seneca 60's

5
178

Grand Total

183
-----

W01-0581758-0



IDAG15461478

**INVOICE/BILL OF LADING****NATIVE NATION****INVOICE # 10552**

Date of Sale 18-Aug-08

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-628-4833

Sold To: Native Wholesale Supply  
Purchaser: 10955 Logan Road  
Perrysburg, NY, 14129

Place of sale: Native Wholesale Supply  
10955 Logan Rd  
Perrysburg, NY 14129

Billed To: Native Wholesale Supply  
10955 Logan Road

Seneca Nation Territory

☐ Shipping Charges Pendin

VIA Seneca Nation  
Perrysburg, NY, 14129

**DESCRIPTION OF GOODS**

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
1070	SENECA Menthol Lt S/P 100	60	✓ 5 1021	\$516.00	\$2,580.00
1060	SENECA Full Flavor H/L King	60 17+18	✓ 35 1024-1025	\$516.00	\$18,060.00 32+3
1061	SENECA Light H/L King	60	✓ 7 1024	\$516.00	\$3,612.00 5+2
1065	SENECA Non Filter H/L King	60	✓ 3 1022	\$516.00	\$1,548.00
1066	SENECA Full Flavor S/P 100	60	✓ 15 1024	\$516.00	\$7,740.00 3+12
1067	SENECA Light S/P 100	60	✓ 10 1027	\$516.00	\$5,160.00
1054	SENECA Full Flavor S/P King	60	✓ 5 1020	\$516.00	\$3,096.00
1069	SENECA Menthol S/P 100	60	✓ 8 1022	\$516.00	\$4,128.00
3133	OPAL Menthol H/Lld 120's	30	✓ 5 1024	\$292.50	\$1,462.50 2+3
1072	SENECA Full Flavor H/L 100	60 18+17	✓ 35 1025-1026	\$516.00	\$18,060.00 52+3
1073	SENECA Light H/L 100	60	✓ 15 1025	\$516.00	\$7,740.00
1074	SENECA Ultra Lt H/L 100	60 7+8	✓ 15 1023-1025	\$516.00	\$7,740.00
1075	SENECA Menthol H/L 100	60 5+3	✓ 8 1024-1026	\$516.00	\$4,128.00
1076	SENECA Menthol Lt H/L 100	60	✓ 4 1021	\$516.00	\$2,064.00
1077	SENECA Menthol Ultra Lt H/L 100	60	✓ 5 1024	\$516.00	\$2,580.00
1068	SENECA Ultra Lt S/P 100's	60	✓ 7 1024	\$516.00	\$3,612.00

23  
32  
32  
32  
32  
32  
183



NEVADA INTERNATIONAL TRADE CORP  
FTZ # 89  
PO BOX 98076  
LAS VEGAS, NV 89193  
(702) 361-3422

# TALLY OUT

WAREHOUSE RELEASE

SHIP TO:	NATIVE WHOLESALE SUPPLY	DATE	8/21/2008
		LOT NO.	
	PERRYSBURG NY	ACCOUNT	NATIVE WHOLESALE
SHIP VIA:	SELF		

Merchandise described hereon is permitted to be transferred and has been constructively transferred to U.S. Customs and Border Protection Territory, under date of _____			U.S. CUSTOMS & BORDER PROTECTION NUMBER & ACTION	
			W01-0581758-0	
ORDER PICKED BY	ORDER LOADED BY	POWER TO LOADING	INVOICE 10552	
		YES <input type="checkbox"/> NO <input type="checkbox"/>		

PKGS.	DESCRIPTION	WEIGHTS / MEASURES
183 CS	CIGARETTES 6 Pallets	
Bal. Fwd. 183		
Pcs. Out 183		
Balance 0		

Signature  Firm Name \_\_\_\_\_

Goods received must be checked at time of delivery or Warehouse will not be responsible for damages or shortages. Drivers are instructed and have no authority to make delivery of C.O.D. shipment to customers without payment in full of the charges. Any adjustments must be made through our offices. This shipment is tendered and received subject to the terms and conditions of the Receiving Carrier's Uniform Bill of Lading, effective June 15, 1941. This receipt is NOT NEGOTIABLE and if the shipment is consigned TO ORDER must be exchanged for the Company's Uniform Order Bill of Lading.

SEAL NO. 4802800

\*IMPORTANT. WAREHOUSE MAXIMUM LIABILITY IS 12.5 CENTS PER POUND AS OUTLINED IN FOREIGN TRADE ZONE TARIFF NO. 1

\*WHITE-ORIGINAL

\*GREEN-U.S. CUSTOMS & BORDER PROTECTION

000380  
IDAG154616

**Law Offices of Leonard Violi, LLC**

910 East Boston Post Road  
Mamaroneck, New York 10543  
Tel: 914.698.6200 Fax: 914.698.6207

[lv@violilaw.com](mailto:lv@violilaw.com)

Mobile 914.610.0236

August 14, 2008

**VIA FAX and REGULAR MAIL**

JoAnne M. Tornberg  
President, CEO  
Nevada International Trade Corporation  
6620 Escondido Street  
Law Vegas, Nevada 89119  
[Nitcoftz1@aol.com](mailto:Nitcoftz1@aol.com)

Re: Native Wholesale Supply Co.

Dear Ms. Tornberg:

This office represents Native Wholesale Supply Co. ("NWS") a current customer of the Nevada International Trade Corporation, Foreign Trade Zone #89. This letter is being provided to advise and assure you that NWS complies with all applicable laws and regulations to which it believes it is subject. In addition, please be advised that NWS will no longer be requesting NITCO to ship or arrange for the shipment of cigarettes to either New Mexico or California.

Very Truly Yours,

Leonard Violi

cc: Native Wholesale Supply Co.

**U.S. DEPARTMENT OF HOMELAND SECURITY  
Bureau of Customs and Border Protection  
ENTRY/IMMEDIATE DELIVERY**

Form Approved  
OMB No. 1515-0069

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
2255A RENAISSANCE DR STE 32  
LAS VEGAS-NV-89119  
702 895-7005  
19 CFR 142.1, 142.16, 142.22, 142.24

CST: 740  
W01

ABI CERTIFIED

1. ARRIVAL DATE 081908	2. ELECTED ENTRY DATE 082008	3. ENTRY TYPE CODE/NAME 06 F.T.Z.	4. ENTRY NUMBER W01-0581758-0
5. PORT 2722	6. SINGLE TRANS. BOND	7. BROKER/IMPORTER FILE NUMBER 05-81758	
	8. CONSIGNEE NUMBER 16-1609830		9. IMPORTER NUMBER 16-1609830
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129		11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129	
12. CARRIER CODE	13. VOYAGE/FLIGHT/TRIP	14. LOCATION OF GOODS CODE(S) NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD	
15. VESSEL CODE/NAME FTZ0089			
16. U.S. PORT OF LANDING	17. MANIFEST NUMBER	18. C.O. NUMBER	19. TOTAL VALUE 25,548
20. DESCRIPTION OF MERCHANDISE 183 CASES OF CIGARETTES			
21. HTS CODE	22. HTS SUBCODE NONPRIV	23. MANIFEST QUANTITY 183	24. H.S. NUMBER 2402208000
			25. COUNTRY OF ORIGIN CA
			26. MANUFACTURER ID. XOGRARIV21760HS

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT: *Kay Rolofson*  
KAY ROLOFSON ATTY-IN-FACT  
PHONE NO. 702 895-7005 DATE 8/20/08  
FAX 702 895-7132  
29. BROKER OR OTHER GOVT. AGENCY USE

28. CBP USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

LOT#	CASES	REF#10552
1020	6	
1021	9	
1022	11	
1023	7	
1024	61	
1025	59	
1026	20	
1027	10	

DELIVERY AUTHORIZED:	SIGNATURE	DATE
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ELECTRONIC ENTRY RELEASE NOTIFICATION  
PORT OF LAS VEGAS, NV

I CERTIFY THAT PROPER RELEASE FOR THIS CARGO HAS BEEN RECEIVED FROM US CUSTOMS COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL KAY ROLOFSON  
DATE 8/20/08

Paperwork Reduction Act Notice: This information is needed to determine the admissibility of imports into the United States and to provide the necessary information for the examination of the cargo and to establish the liability for payment of duties and taxes. Your response is necessary.

000382  
IDAG154618

9/17/2008  
NATIVE WHOLESale SUPPLY  
Invoice # 10709

Nevada F. T. Z. #89 Warehouse Withdrawal

Item #	Seneca 60's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
11054	Full Flavor S/P King	1021	1022	1024	1026	1027	1028	1029	1030	1031	1032			15
11056	Ultra Lt S/P King		3				15							3
11060	Full Flavor H/L King							3	27					30
11061	Light H/L King.							15						15
11063	Menthhol H/L King						8							8
11065	Non-Filter H/L King						10							10
11066	Full Flavor S/P 100							15						15
11067	Light S/P 100							2						15
11068	Ultra Lt S/P 100						13							15
11069	Menthhol S/P 100					5	8							8
11070	Menthhol Lt S/P 100						10							5
11071	Menthhol Ultra Lt S/P 100	3												10
11072	Full Flavor H/L 100													3
11073	Light H/L 100									40				40
11074	Ultra Lt H/L 100								15					15
11075	Menthhol H/L 100								10					10
11076	Menthhol Light H/L 100							11	4					15
							1			9				10
Total		3	3	0	0	20	50	46	56	49	0			227

Item #	Opal 30's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
33130	Full Flavor H/L 120	1021	1022	1024	1026	1027	1028	1029	1030	1031	1032			8
33132	Ultra Lt H/L 120				8									10
33133	Menthhol H/L 120			5										5
33134	Menthhol Lt H/L 120									8				8
Total		0	0	5	8	0	0	0	0	0	8	10		31

Item #	Seneca 120's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
33055	Light H/L 120	1021	1022	1024	1026	1027	1028	1029	1030	1031	1032			10
Total		0	0	0	0	0	10	0	0	0	0	0		10

Zone Totals	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
	1021	1022	1024	1026	1027	1028	1029	1030	1031	1032				268
	3	3	5	8	20	60	46	56	57	10				

Opal 30's	31
Seneca 120's	10
Seneca 60's	227
Grand Total	268

1001-0581801-8

## INVOICE/BILL OF LADING

NATIVE NATION

INVOICE # 10709

Date of Sale 18-Sep-08

Shipped Date:

Seller: Native Wholesale Supply

Sold To: Native Wholesale Supply

PO Box 214

Purchaser: 10955 Logan Road

Gowanda, N.Y. 14070

Perrysburg, NY. 14129

Toll Free: 1-877-628-4833

Place of sale: Native Wholesale Supply  
10955 Logan RdBilled To: Native Wholesale Supply  
10955 Logan Road

Perrysburg, NY 14129

VIA Seneca Nation

Seneca Nation Territory

☐ Shipping Charges Pending

Perrysburg, NY, 14129

## DESCRIPTION OF GOODS

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
<del>4074</del>	SENECA Menthol Ultra Lt S/P 100	60	✓3	\$516.00	\$1,548.00
<del>4056</del>	SENECA Ultra Lt S/P King	60	✓3	\$516.00	\$1,548.00
<del>4060</del>	SENECA Full Flavor H/L King	60	3+27✓30	\$516.00	\$15,480.00
<del>4061</del>	SENECA Light H/L King	60	✓15	\$516.00	\$7,740.00 2+13
<del>4063</del>	SENECA Menthol H/L King	60	✓8	\$516.00	\$4,128.00
<del>4065</del>	SENECA Non Filter H/L King	60	✓10	\$516.00	\$5,160.00
<del>4066</del>	SENECA Full Flavor S/P 100	60	✓15	\$516.00	\$7,740.00
<del>4067</del>	SENECA Light S/P 100	60	13+2✓15	\$516.00	\$7,740.00
<del>4068</del>	SENECA Ultra Lt S/P 100's	60	✓8	\$516.00	\$4,128.00
<del>4064</del>	SENECA Full Flavor S/P King	60	✓15	\$516.00	\$7,740.00
<del>4070</del>	SENECA Menthol Lt S/P 100	60	✓10	\$516.00	\$5,160.00
<del>0734</del>	OPAL Menthol Lt H/Lid 120's	30	✓8	\$292.50	\$2,340.00
<del>4072</del>	SENECA Full Flavor H/L 100	60	✓40	\$516.00	\$20,640.00 8+32
<del>4073</del>	SENECA Light H/L 100	60	✓15	\$516.00	\$7,740.00
<del>4074</del>	SENECA Ultra Lt H/L 100	60	✓10	\$516.00	\$5,160.00
<del>4075</del>	SENECA Menthol H/L 100	60	11+4✓15	\$516.00	\$7,740.00
<del>4076</del>	SENECA Menthol Lt H/L 100	60	1+9✓10	\$516.00	\$5,160.00 7+3
<del>0055</del>	Seneca Light H/L 120's	30	✓10	\$292.50	\$2,925.00
<del>0730</del>	OPAL Full Flavor H/Lid 120's	30	✓8	\$292.50	\$2,340.00
<del>0732</del>	OPAL Ultra Lt H/Lid 120	30	✓10	\$292.50	\$2,925.00
<del>3168</del>	OPAL Menthol H/Lid 120's	30	✓5	\$292.50	\$1,462.50 1+4
<del>4069</del>	SENECA Menthol S/P 100	60	✓5	\$516.00	\$2,580.00

32

32

32

32

32

32

140

28

24

20

36

108

160

268

**DESCRIPTION OF GOODS**

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
	Total Cases Delivered	268			
	Total Cartons Delivered	14850	Add one extra handling unit to any fraction of the whole number.		Sub Total \$129,124.50
	Total Packs Delivered	148500			Shipping \$0.00
	Total Sticks Delivered	2970000	Units 8.3		Discounts \$0.00
			Total Weight (Lbs) 11256		TOTAL THIS ORDER \$129,124.50

**CONDITION OF SALE**

THESE GOODS HAVE BEEN SOLD TO PURCHASER AT THE SENECA NATION TERRITORY. THEY ARE FOR DELIVERY ONLY AT SENECA NATION TERRITORY AND MAY BE TRANSPORTED BY PURCHASER, ONLY AT SENECA NATION TERRITORY OR TO THE TERRITORY OF ANOTHER NATIVE NATION. THE GOODS SO SOLD AND DELIVERED ARE ONLY FOR TRANSPORTED RESALE TO DISTRIBUTORS AT SENECA NATION TERRITORY OR SUCH OTHER NATIVE TERRITORY TO WHICH THEY ARE TRANSPORTED.

Purchaser's Signature x \_\_\_\_\_

**ACKNOWLEDGMENT OF DELIVERY AT THE POINT AND TIME OF SALE**

Purchaser's signature below hereby acknowledges delivery and receipt of the above described goods at SENECA NATION TERRITORY on this \_\_\_\_\_ day of \_\_\_\_\_, 2008

Purchaser's Signature x \_\_\_\_\_ 10709

**BILL OF LADING:****TRANSPORT AUTHORIZATION**

Product Class: 85	Product: Tobacco	Stackable
-------------------	------------------	-----------

Purchaser's Transport Destination Purchaser's Transporter:

Native Wholesale Supply SELF  
10955 Logan Road

Perrysburg, NY, 14129

**Transporter Information:**

Volume Disc. Track#:

Shipper Pro#:

Web Address:

Please allow 6 to 7 days for shipping  
(does not include holidays or weekends)

Purchaser's signature below authorizes and directs the transporter to transport Purchaser's goods, which have been purchased at Seneca Nation Territory, to Purchaser's Transport Destination as set forth above.

Purchaser's Signature x \_\_\_\_\_

**VERIFICATION OF ARRIVAL AT PURCHASER'S TRANSPORT DESTINATION**

Purchaser's Transport Destination Tribe \_\_\_\_\_ State \_\_\_\_\_

Date Arrived at Purchaser's Transport Destination \_\_\_\_ / \_\_\_\_ / \_\_\_\_

Signature of person who received at Purchaser's Transport Destination x \_\_\_\_\_

NEVADA INTERNATIONAL TRADE CORP  
FTZ # 89  
PO BOX 98076  
LAS VEGAS, NV 89193  
(702) 361-3422

# TALLY OUT

WAREHOUSE RELEASE

SHIP TO:	NATIVE WHOLESAL SUPPLY	DATE	9/19/2008
	10995 LOGAN RD	LOT NO.	
	PERRYSBURG NY	ACCOUNT	NATIVE WHOLESAL
SHIP VIA:	SELF		

Merchandise described hereon is permitted to be transferred and has been constructively transferred to U.S. Customs and Border Protection Territory, under date of _____			U.S. CUSTOMS & BORDER PROTECTION NUMBER & ACTION	
			W01-0581801-8	
ORDER PICKED BY	ORDER LOADED BY	POWER TO LOADING	INVOICE 10709	
		YES <input type="checkbox"/> NO <input type="checkbox"/>		
PKGS.	DESCRIPTION	WEIGHTS / MEASURES		
268 CS	CIGARETTES			
Bal. Fwd. 268				
Pcs. Out 268				
Balance 0				

Signature *Don Ladd* 9-24-08 268 on 9 pks. Firm Name *Leaden*

SEAL NO. 4802738

Goods received must be checked at time of delivery or Warehouse will not be responsible for damages or shortages. Drivers are instructed and have no authority to make delivery of C.O.D. shipment to customers without payment in full of the charges. Any adjustments must be made through our offices. This shipment is tendered and received subject to the terms and conditions of the Receiving Carrier's Uniform Bill of Lading, effective June 15, 1941. This receipt in NOT NEGOTIABLE and if the shipment is consigned TO ORDER must be exchanged for the Company's Uniform Order Bill of Lading.

\*IMPORTANT. WAREHOUSE MAXIMUM LIABILITY IS 12.5 CENTS PER POUND AS OUTLINED IN FOREIGN TRADE ZONE TARIFF NO. 1

\*WHITE-ORIGINAL

\*GREEN-U.S. CUSTOMS & BORDER PROTECTION

000386  
IDAG155533

**U.S. DEPARTMENT OF HOMELAND SECURITY  
Bureau of Customs and Border Protection  
ENTRY/IMMEDIATE DELIVERY**

Form Approved  
OMB No. 1515-0069

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
2255A RENAISSANCE DR STE 32  
LAS VEGAS-NV-89119  
702 895-7005

CST: 740  
WO1

19 CFR 142.3, 142.16, 142.22, 142.24

ABI CERTIFIED

1. ARRIVAL DATE 091708	2. ELECTED ENTRY DATE 091708	3. ENTRY TYPE CODE/NAME 06 F.T.Z.	4. ENTRY NUMBER WO1-0581801-8
5. PORT 2722	6. SINGLE TRANS. BOND	7. BROKER/IMPORTER FILE NUMBER 05-81801	
8. CONSIGNEE NUMBER 16-1609830		9. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129		11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129	
12. CARRIER CODE	13. VOYAGE/FLIGHT/TRIP	14. LOCATION OF GOODS CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD	
15. VESSEL CODE/NAME FTZ0089			
16. U.S. PORT OF LANDING	17. MANIFEST NUMBER	18. G.O. NUMBER	19. TOTAL VALUE 35,697
20. DESCRIPTION OF MERCHANDISE 268 CASES OF CIGARETTES			
21. ITEM/AWB CODE	22. ITEM/AWB NO. NONPRIV	23. MANIFEST QUANTITY 268	24. H.S. NUMBER 2402208000
			25. COUNTRY OF ORIGIN CA
			26. MANUFACTURER ID. XOGRARIV2176OHS

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

28. CBP USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

SIGNATURE OF APPLICANT

KAY ROLOFSON ATTY-IN-FACT

PHONE NO.

702 895-7005

DATE

9/17/08

FAX 702 895-7132

29. BROKER OR OTHER GOVT. AGENCY USE

LOT#	CASES	REF#	10709
1021	3	1031	57
1022	3	1032	10
1024	5		
1026	8		
1027	20		
1028	60		
1029	46		
1030	56		

DELIVERY AUTHORIZED:	SIGNATURE	DATE
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ELECTRONIC ENTRY RELEASE NOTIFICATION

PORT OF LAS VEGAS, NV

I CERTIFY THAT PROPER RELEASE FOR THIS CARGO HAS BEEN RECEIVED FROM US CUSTOMS COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL KAY ROLOFSON

DATE 9/17/08

Paperwork Reduction Act Notice: This information is needed to determine the admissibility of imports into the United States and to provide the necessary information for the examination of the cargo and to establish the liability for payment of duties and taxes. Your response is necessary.

000387

IDAG155534



11/6/2008

Nevada F.T.Z. Warehouse Withdrawal

Native Wholesale Supply

Inv 11003

000388

IDAG 155696

Item #	Seneca 60's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
11055	Light S/P King	1032	1034	1037	1040	1041	1042	1043	1046	1047			5
11060	Full Flavor H/L King	5						40					40
11064	Menthol Light H/L King					4				1			5
11065	Non-Filter H/L King				5								5
11066	Full Flavor S/P 100				20								20
11068	Ultra Lt S/P 100		10										10
11072	Full Flavor H/L 100							40					40
11073	Light H/L 100							33	7				40
11074	Ultra Lt H/L 100							40					40
11076	Menthol Light H/L 100					3	2						5
11077	Menthol Ult H/L 100					10							10
Total		5	10	0	25	17	75	87	0	1			220

Item #	Opal 30's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
33130	Full Flavor H/L 120	1032	1034	1037	1040	1041	1042	1043	1046	1047		15
33131	Light H/L 120					15						15
33132	Ultra Lt H/L 120							15				15
33134	Menthol Lt H/L 120			5								5
Total		0	0	5	0	15	0	15	15	0		50

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1032	1034	1037	1040	1041	1042	1043	1046	1047		
5	10	5	25	32	75	102	15	1		270

Opal 30's  
Seneca 60's

50
220

W01-0581866-1

Grand Total

270
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**INVOICE/BILL OF LADING****NATIVE NATION****INVOICE # 11003****Date of Sale** 06-Nov-08**Shipped Date:**

**Seller:** Native Wholesale Supply  
10955 Logan Road  
Perryburg, NY 14129  
Seneca Nation Territory

**Sold To** Native Wholesale Supply  
**Purchaser:** 10955 Logan Road

Perryburg, NY, 14129  
at Seneca Nation Territory

**Place of sale:** Native Wholesale Supply  
10955 Logan Road  
Perryburg, NY 14129  
Seneca Nation Territory

**Billed To:** Native Wholesale Supply  
10955 Logan Road

VIA Seneca Nation  
Perryburg, NY, 14129

☐ Shipping Charges Pendin

\*Not affiliated with the Seneca Nation of Indians Government\*

**DESCRIPTION OF GOODS**

Item Code:	Item:	Pack:	Quantity:	Price Per Unit:	Extension:
3134	OPAL Menthol Lt H/Lid 120's	30	✓ 5 1037	\$292.50	\$1,462.50 2+1+2
3132	OPAL Ultra Lt H/Lid 120	30	✓ 15 1043	\$292.50	\$4,387.50
3131	OPAL Light H/Lid 120's	30	✓ 15 1046	\$292.50	\$4,387.50 6+7+2
3130	OPAL Full Flavor H/Lid 120's	30	✓ 15 1041	\$292.50	\$4,387.50
1077	SENECA Menthol Ultra Lt H/L 100	60	✓ 10 1041	\$516.00	\$5,160.00
1076	SENECA Menthol Lt H/L 100	60 3-2	✓ 5 1041-1042	\$516.00	\$2,580.00
1074	SENECA Ultra Lt H/L 100	60	✓ 40 1042	\$516.00	\$20,640.00 32+B
1073	SENECA Light H/L 100	60 33-7	✓ 40 1042-1043	\$516.00	\$20,640.00 32+B
1072	SENECA Full Flavor H/L 100	60	✓ 40 1043	\$516.00	\$20,640.00 32+B
1068	SENECA Ultra Lt S/P 100's	60	✓ 10 1034	\$516.00	\$5,160.00
1066	SENECA Full Flavor S/P 100	60	✓ 20 1040	\$516.00	\$10,320.00
1065	SENECA Non Filter H/L King	60	✓ 5 1040	\$516.00	\$2,580.00
1064	SENECA Menthol Lt H/L King	60 4-1	✓ 5 1041-1047	\$516.00	\$2,580.00
1060	SENECA Full Flavor H/L King	60	✓ 40 1043	\$516.00	\$20,640.00
1055	SENECA Light S/P King	60	✓ 5 1032	\$516.00	\$2,580.00

2  
32  
32  
32  
32  
32  
30  
32  
24  
24

270

**DESCRIPTION OF GOODS**

Item Code:	Item:	Pack:	Quantity:	Price Per Unit:	Extension:
	Total Quantity Delivered	270			
	Total Cartons Delivered	14,700	Add one extra handling unit to any fraction of the whole number.		Sub Total \$128,145.00
	Total Packs Delivered	147,000			Shipping \$0.00
	Total Sticks Delivered	2,940,000	Units 9.0		Discounts \$0.00
			Total Weight (Lbs) 7128		TOTAL THIS ORDER \$128,145.00

**CONDITION OF SALE**

All prices in US Dollars

These goods have been sold to Purchaser at the Seneca Nation Territory. They are for delivery only at Seneca Nation Territory and may be transported by Purchaser, only at Seneca Nation Territory or to the Territory of another native nation. The goods so sold and delivered are only for transported resale to distributors at Seneca Nation Territory or such other Native Territory to which they are transported.

Purchaser's Signature ☒**ACKNOWLEDGMENT OF DELIVERY AT THE POINT AND TIME OF SALE**

Purchaser's signature below hereby acknowledges delivery and receipt of the above described goods at SENECA NATION TERRITORY on this \_\_\_\_\_ day of \_\_\_\_\_, 2008

Purchaser's Signature ☒**BILL OF LADING:****TRANSPORT AUTHORIZATION**

Product Class: 85	Product: Tobacco	Stackable
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Purchaser's Transport Destination Purchaser's Transporter:

Native Wholesale Supply  
10955 Logan Road

SELF

Transporter Information:

Volume Disc. Track#:

Roadway Pro#:

Web Address:

Please allow 5 to 7 days for shipping  
(does not include holidays or weekends)

Perrysburg, NY, 14129

Tracking Ph#

Purchaser's signature below hereby authorizes and directs the transporter to transport Purchaser's goods, which have been purchased at Seneca Nation Territory, to Purchaser's Transport Destination as set forth above.

Purchaser's Signature ☒**VERIFICATION OF ARRIVAL AT PURCHASER'S TRANSPORT DESTINATION**

Purchaser's Transport Destination Tribe \_\_\_\_\_ State \_\_\_\_\_

Date Arrived at Purchaser's Transport Destination \_\_\_\_/\_\_\_\_/\_\_\_\_

Signature of person who received at Purchaser's Transport Destination ☒

NEVADA INTERNATIONAL TRADE CORP  
FTZ # 89  
PO BOX 98076  
LAS VEGAS, NV 89193  
(702) 361-3422

# TALLY OUT

WAREHOUSE RELEASE

SHIP TO:	NATIVE WHOLESALE SUPPLY	DATE	11/10/2008
	10995 LOGAN RD	LOT NO.	
	PERRYSBURG NY	ACCOUNT	NATIVE WHOLESALE
SHIP VIA:	SELF		

Merchandise described hereon is permitted to be transferred and has been constructively transferred to U.S. Customs and Border Protection Territory, under date of _____			U.S.CUSTOMS & BORDER PROTECTION NUMBER & ACTION
			W01-0581866-1
ORDER PICKED BY	ORDER LOADED BY	POWER TO LOADING	INVOICE 11003
		YES <input type="checkbox"/> NO <input type="checkbox"/>	

PKGS.	DESCRIPTION	WEIGHTS / MEASURES
270 CS	CIGARETTES	
Bal. Fwd. 270 Pcs. Out 270 Balance 0		

Signature <i>[Signature]</i>	Firm Name <i>LEADER</i>	SEAL NO.4849115
Goods received must be checked at time of delivery or Warehouse will not be responsible for damages or shortages. Drivers are instructed and have no authority to make delivery of C.O.D. shipment to customers without payment in full of the charges. Any adjustments must be made through our offices. This shipment is tendered and received subject to the terms and conditions of the Receiving Carrier's Uniform Bill of Lading, effective June 15, 1941. This receipt in NOT NEGOTIABLE and if the shipment is consigned TO ORDER must be exchanged for the Company's Uniform Order Bill of Lading.		

\*IMPORTANT. WAREHOUSE MAXIMUM LIABILITY IS 12.5 CENTS PER POUND AS OUTLINED IN FOREIGN TRADE ZONE TARIFF NO. 1

\*WHITE-ORIGINAL

\*GREEN-U.S. CUSTOMS & BORDER PROTECTION

000391

IDAG155699

**U.S. DEPARTMENT OF HOMELAND SECURITY  
Bureau of Customs and Border Protection  
ENTRY/IMMEDIATE DELIVERY**

Form Approved  
Customs No. 1515-0009

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
2255A RENAISSANCE DR STE 32  
LAS VEGAS-NV-89119  
702 895-7005

CST: 740  
WO1

19 CFR 142.3, 142.16, 142.22, 142.24

ABI CERTIFIED

1. ARRIVAL DATE 110608		2. ELECTED ENTRY DATE 110608		3. ENTRY TYPE CODE/NAME 06 F.T.Z.		4. ENTRY NUMBER WO1-0581866-1	
5. PORT 2722		6. SINGLE TRANS. BOND		7. BROKER/IMPORTER FILE NUMBER 05-81866			
		8. CONSIGNEE NUMBER 16-1609830				9. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129				11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129			
12. CARRIER CODE		13. VOYAGE/FLIGHT/TRIP		14. LOCATION OF GOODS-CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD			
15. VESSEL CODE/NAME FTZ0089							
16. U.S. PORT OF LANDING		17. MANIFEST NUMBER		18. C.D. NUMBER		19. TOTAL VALUE 35,520	
20. DESCRIPTION OF MERCHANDISE 270000 CASES OF CIGARETTES							
21. IT/BL/AWB CODE	22. IT/BL/AWB NO. NONPRIV	23. MANIFEST QUANTITY 270	24. H.S. NUMBER 2402208000	25. COUNTRY OF ORIGIN CA	26. MANUFACTURER ID. XOGRARIV2176OHS		

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

**28. CBP USE ONLY**

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

SIGNATURE OF APPLICANT

PHONE NO.

702 895-7005

DATE

11/06/08

FAX 702 895-7132

29. BROKER OR OTHER GOVT. AGENCY USE

LOT#	CASES	REF#	11003
1032	5	1047	1
1034	10		
1037	5		
1040	25		
1041	32		
1042	75		
1043	102		
1046	15		

DELIVERY AUTHORIZED:

SIGNATURE

DATE

ELECTRONIC ENTRY RELEASE NOTIFICATION  
PORT OF LAS VEGAS, NV

I CERTIFY THAT PROPER RELEASE FOR THIS  
CARGO HAS BEEN RECEIVED FROM US CUSTOMS  
COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL KAY ROLOFSON

DATE 11/06/08

5/12/2008  
Warpath  
Invoice # 9907

Nevada F.T.Z. Warehouse Withdrawal

000393

Item #	Seneca 60's	Zone # 989	Zone # 997	Zone # 998	Zone # 999	Zone # 1000	Zone # 1001	Zone # 1004	Total
11060	Full Flavor H/L King					25			25
11061	Light H/L King					15			15
11063	Menthol H/L King					5			5
11067	Light S/P 100				5				5
11068	Ultra Lt S/P 100					5			5
11069	Menthol S/P 100						3		3
11070	Menthol Lt S/P 100			3					3
11071	Menthol Ultra Lt S/P 100	2							2
11072	Full Flavor H/L 100						25		25
11073	Light H/L 100					15			15
11074	Ultra Lt H/L 100						5		5
11075	Menthol H/L 100				10				10
11076	Menthol Light H/L 100			10					10
11077	Menthol Ult H/L 100				2				2
Total		2	0	13	17	65	33	0	130
Item #	Opal 30's	Zone # 989	Zone # 997	Zone # 998	Zone # 999	Zone # 1000	Zone # 1001	Zone # 1004	Total
33131	Light H/L 120		8						8
33132	Ultra Lt H/L 120				4			4	8
Total		0	8	0	4	0	0	4	16

Zone Totals

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
989	997	998	999	1000	1001	1004		
2	8	13	21	65	33	4		146

Opal 30's  
Seneca 60's

16
130

W01-0581603-8

Grand Total

146
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# INVOICE/BILL OF LADING

# NATIVE NATION

INVOICE # 9907

Date of Sale 09-May-08

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-628-4833

Sold To: Wapah  
Purchase: North 165 Highway 85  
Plummer ID 83851

Place of Sale: Native Wholesale Supply  
10955 Logan Rd  
Perryburg, NY 14129  
Seneca Nation Territory

Billed To: War Path  
North 165 Highway 85  
VIA  
Plummer ID 83851

☐ Shipping Charges Pending

## DESCRIPTION OF GOODS

Item Code:	Item:	Case:	Quantity:	Price Per Unit:	Extension:
1072	SENECA Full Flavor H/L 100	60	✓ 25 <del>000</del>	\$456.00	\$11,400.00
1001	SENECA Light H/L King	60	✓ 15 <del>000</del>	\$468.00	\$6,840.00
1000	SENECA Menthol H/L King	60	✓ 5 <del>000</del>	\$456.00	\$2,280.00
1007	SENECA Light S/P 100	60	✓ 5 <del>000</del>	\$456.00	\$2,280.00
1008	SENECA Ultra Lt S/P 100's	60	✓ 5 <del>000</del>	\$456.00	\$2,280.00
1000	SENECA Menthol S/P 100	60	✓ 3 <del>000</del>	\$456.00	\$1,368.00
1000	SENECA Full Flavor H/L King	60	✓ 25 <del>000</del>	\$456.00	\$11,400.00
1071	SENECA Menthol Ultra Lt S/P 100	60	✓ 2 <del>000</del>	\$456.00	\$912.00
0102	OPAL Ultra Lt H/Lid 120	30	4r ✓ 48 <del>000</del>	\$262.50	\$2,100.00
1073	SENECA Light H/L 100	60	✓ 15 <del>000</del>	\$456.00	\$6,840.00
1074	SENECA Ultra Lt H/L 100	60	✓ 5 <del>000</del>	\$456.00	\$2,280.00
1075	SENECA Menthol H/L 100	60	✓ 10 <del>000</del>	\$456.00	\$4,560.00 7+3
1076	SENECA Menthol Lt H/L 100	60	✓ 10 <del>000</del>	\$456.00	\$4,560.00 5+5
1077	SENECA Menthol Ultra Lt H/L 100	60	✓ 2 <del>000</del>	\$456.00	\$912.00
0101	OPAL Light H/Lid 120's	30	✓ 8 <del>000</del>	\$262.50	\$2,100.00 2+3+3
1070	SENECA Menthol Lt S/P 100	60	✓ 3 <del>000</del>	\$456.00	\$1,368.00

32-1314

32-1514

32-1540

26-920

24-954

146-6242





**U.S. DEPARTMENT OF HOMELAND SECURITY**  
**Bureau of Customs and Border Protection**  
**ENTRY/IMMEDIATE DELIVERY**

Form Approved  
 CMB No. 1615-0089

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
 2255A RENAISSANCE DR STE 32  
 LAS VEGAS-NV-89119  
 702 895-7005

CST: 740  
 WO1

19 CFR 142.3, 142.16, 142.22, 142.24

**ARI CERTIFIED**

1. ARRIVAL DATE 051208		2. ELECTED ENTRY DATE 051208		3. ENTRY TYPE CODE/NAME 06 F.T.Z.		4. ENTRY NUMBER WO1-0581603-8	
5. PORT 2722		6. SINGLE TRANS. BOND		7. BROKER/IMPORTER FILE NUMBER 05-81603			
		8. CONSIGNEE NUMBER 16-1609830				9. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129				11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129			
12. CARRIER CODE		13. VOYAGE/FLIGHT/TITUP		14. LOCATION OF GOODS CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD			
15. VESSEL CODE/NAME FTZ0089							
16. U.S. PORT OF LANDING		17. MANIFEST NUMBER		18. C.O. NUMBER		19. TOTAL VALUE 19,770	
20. DESCRIPTION OF MERCHANDISE 146 CASES OF CIGARETTES							
21. ITB/LAWB CODE	22. ITB/LAWB NO. NONPRIV	23. MANIFEST QUANTITY 146		24. H.S. NUMBER 2402208000	25. COUNTRY OF ORIGIN CA	26. MANUFACTURER ID. XOGRARIV2176OHS	


I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

28. CBP USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

SIGNATURE OF APPLICANT  
 KAY ROLOFSON ATTY-IN-FACT

PHONE NO. 702 895-7005 DATE 5/12/08

FAX 702 895-7132

29. BROKER OR OTHER GOVT. AGENCY USE

LOT#	CASES	REF#9907
989	2	
997	8	
998	13	
999	21	
1000	65	
1001	33	
1004	4	

DELIVERY AUTHORIZED:	SIGNATURE	DATE
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**ELECTRONIC ENTRY RELEASE NOTIFICATION**  
 PORT OF LAS VEGAS, NV  
 I CERTIFY THAT PROPER RELEASE FOR THIS CARGO HAS BEEN RECEIVED FROM US CUSTOMS COMPANY GENE MACK LAS VEGAS  
 AUTHORIZING OFFICIAL KAY ROLOFSON  
 DATE 5/12/08

6/13/2008  
WAR PATH  
INV 10114

Nevada F.T.Z. Warehouse Withdrawal

Item #	Seneca 60's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
11060	Full Flavor H/L King	1002	1006	1007	1009	1010	1011		25
11066	Full Flavor S/P 100			7	18				10
11067	Light S/P 100				10				10
11068	Ultra Lt S/P 100		5						5
11072	Full Flavor H/L 100							40	40
11073	Light H/L 100			5		10			15
11074	Ultra Lt H/L 100						15		15
11077	Menthol Ult H/L 100					5			5
Total		0	5	12	38	15	55		125

Item #	Opal 30's	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
33130	Full Flavor H/L 120	1002	1006	1007	1009	1010	1011	15
33132	Ultra Lt H/L 120	4	15				11	15
33134	Menthol Lt H/L 120		5					5
Total		4	20	0	0	0	11	35

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1002	1006	1007	1009	1010	1011		160
4	25	12	38	15	66		

Opal 30's	35
Seneca 60's	125
Grand Total	160

W01-0581647-5

# INVOICE/BILL OF LADING

## NATIVE NATION

## INVOICE # 10114

Date of Sale 12-Jun-08

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-628-4833

Sold To War Path  
Purchaser: North 165 Highway 95  
Plummer, ID, 83851

Place of sale: Native Wholesale Supply  
10955 Logan Rd  
Perrysburg, NY 14129

Billed To: War Path  
North 165 Highway 95

VIA Coeur d'Alene Indian Nation  
Plummer, ID, 83851

Seneca Nation Territory

☐ Shipping Charges Pending

### DESCRIPTION OF GOODS

Item Code	Item:	Case:	Quantity:	Price Per Unit:	Extension:
3134	OPAL Menthol Lt H/Lid 120's	30	✓ 5 1006	\$262.50	\$1,312.50
3132	OPAL Ultra Lt H/Lid 120	30	✓ 15 1006	\$262.50	\$3,937.50
3130	OPAL Full Flavor H/Lid 120's	30 4+11	✓ 15 1002-1011	\$262.50	\$3,937.50
1077	SENECA Menthol Ultra Lt H/L 100	60	✓ 5 1009	\$456.00	\$2,280.00
1074	SENECA Ultra Lt H/L 100	60	✓ 15 1011	\$456.00	\$6,840.00
1073	SENECA Light H/L 100	60 5-10	✓ 15 1007-1010	\$456.00	\$6,840.00
1072	SENECA Full Flavor H/L 100	60	✓ 40 1011	\$456.00	\$18,240.00 32+2+2+4
1068	SENECA Ultra Lt S/P 100's	60	✓ 5 1006	\$456.00	\$2,280.00
1087	SENECA Light S/P 100	60	✓ 10 1009	\$456.00	\$4,560.00
1086	SENECA Full Flavor S/P 100	60	✓ 10 1009	\$456.00	\$4,560.00
1060	SENECA Full Flavor H/L King	60 7+18	✓ 25 1007-1009	\$456.00	\$11,400.00

1 2 1  
32-1522  
32-1318  
32-1530  
32-904  
32-1220  

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160-6494



## STRAIGHT BILL OF LADING

ISO-9001 &amp; 14001

DRIVER PLEASE NOTE

IF SINGLE SHIPMENT  
CHECK BOX BELOW

RE PREPAID UNLESS MARKED COLLECT

☐ COLLECT

ORIGINAL - NOT NEGOTIABLE

706-567853

Driver's signature acknowledges receipt of freight only. Unless otherwise agreed to under separate contract, terms and conditions of tariff CNWY 108 apply.

5 CWY 29002-1G EDI/SPCL # DEST SIC

DATE	P.O. NO.	SHIPPER NO.
6-13-08	INV# 10114	
CUSTOMER'S SPECIAL REFERENCE NUMBER		

SHIPPER (FROM) NEVADA INTERNATIONAL TRADE

CONSIGNEE (TO)

WAR PATH

STREET

STREET

6620 ESCONDIDO ST STE E

NORTH 165 HWY 95

CITY, STATE/PROVINCE, ZIP/POSTAL CODE

(TELEPHONE)

CITY, STATE/PROVINCE, ZIP/POSTAL CODE

(TELEPHONE)

LAS VEGAS

NV 89119

PLUMMER RD 83851

BILL TO NATIVE WHOLESALE SUPPLY

CUSTOMS BROKER

STREET PO BOX 214

STREET

CITY, STATE/PROVINCE, ZIP/POSTAL CODE

(TELEPHONE)

CITY, STATE/PROVINCE, ZIP/POSTAL CODE

(TELEPHONE)

GOWANDA

NY 14070

ACCOUNT CODE

☐ Con-way  
GUARANTEED☐ Con-way  
RATESAVER

NUMBER SHIPPING UNITS	HM	KIND OF PACKAGING, DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS (SUBJECT TO INSPECTION AND CORRECTION)	NMFC NO.	CLASS OR DENSITY OF ARTICLES	WEIGHT (Subject to Correction) <input type="checkbox"/> lb <input type="checkbox"/> kg
160		CASES CIGARETTES	47770	85	6494

COD AMOUNT: \$

COD ☐ Prepaid

REMIT COD TO

☐ U.S. ☐ CanadianFee: ☐ Collect

ADDRESS

NOTE: Consignee's company check made payable to the Shipper will be accepted by Con-way and forwarded to shipper unless otherwise directed to do so by the shipper.

CITY

STATE/PROVINCE

ZIP/POSTAL CODE

Notice: Unless the Shipper completes the requirements as provided below, Carrier's liability shall be limited as stated herein and in Tariff CNWY-199, which may be obtained by request. Carrier shall in no event be liable for loss of profit, income, interest, attorney fees, or any special, incidental or consequential damages. Where the rate or NMFC classification is dependent on value, shippers are required to state specifically in writing the declared value of the property. For this purpose the declared value of the property is hereby specifically stated by the Shipper to be not exceeding \$  
Also, paragraph number 2 on the reverse side of this Bill of Lading sets forth released value terms and conditions.

Carrier liability with shipment originating within the United States: Unless the Shipper declares excess value on the Bill of Lading below, requests excess liability coverage and pays an additional charge, Carrier's maximum liability is \$25.00 per pound per individual lost or damaged piece within the shipment, subject to \$150,000.00 maximum total liability per shipment, and provided further that Carrier's liability on articles other than new articles, including but not limited to used, remanufactured or refurbished articles, shall not exceed ten cents (\$.10) per pound per individual lost or damaged piece within the shipment. And, provided further, that Carrier's liability on household goods and personal effects shall not exceed ten cents (\$.10) per pound per individual lost or damaged piece within the shipment. For this purpose the declared value of the property is hereby specifically stated by the Shipper to be \$  
and Shipper agrees to pay an additional charge for excess liability coverage. Total declared value may not exceed \$650,000.00 per shipment.

Carrier liability with shipment originating within Canada: Unless the Shipper agrees to a Special Agreement, declares the value in the box below and agrees to pay the excess liability charge by initialing where indicated, Carrier's maximum liability is CAN\$2.00 per pound (CAN\$4.41 per kilogram) per individual lost or damaged piece within the shipment, subject to a maximum total liability per shipment of CAN\$20,000.00, and provided further that Carrier's liability on articles other than new articles, including but not limited to used, remanufactured or refurbished articles, shall not exceed ten cents (\$.10) (CAN) per pound per individual lost or damaged piece within the shipment. And, provided further, that Carrier's liability on household goods and personal effects shall not exceed ten cents (\$.10) (CAN) per pound per individual lost or damaged piece within the shipment.

SPECIAL AGREEMENT: Declared Value: CAN \$ per pound. (Declared value may not exceed CAN \$100,000.00 per shipment.)

Shipper agrees to pay excess liability charge: (Shipper's Initials)

Shipper Certification: I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are properly classified, packaged, marked and labeled/placarded, and are in all respects in proper condition for transport according to applicable governmental laws and regulations as well as Carrier's tariffs and NMFC classifications.

Shipment Received: The shipment is received subject to Tariff CNWY-199, Carrier's pricing schedules, terms, conditions and rules maintained at Carrier's general offices in effect on the date of issue of this Bill of Lading, as well as the National Motor Freight Classifications (NMFC), the Hazardous Materials Transportation Regulations (Title 49 - CFR, Subtitle B, Chapter 1, Sub Chapter A-C), and the Household Goods Mileage Guide (HHGB 105 Series), for shipments originating in the United States; and the Canadian Motor Vehicle Transport Act, the Transportation of Dangerous Goods Act, and the regulations in force in the provincial jurisdiction at the time and place of the shipment for shipments originating in Canada. The property described on this Bill of Lading is in apparent good order, but only to the extent that it is unconcealed and visible without further inspection and, except as noted or marked. The property is consigned and destined as indicated above. The word Carrier is defined throughout this contract as meaning any person or corporation in possession of the property under this contract. Carrier agrees to carry the property to its destination if on its route, otherwise to deliver to another Carrier on the route to said destination. In the event no markings are indicated on the Bill of Lading stating that the shipment is to be billed as PPD or COL, all shipments will be billed as PPD. It is mutually agreed as to each Carrier of all or any of said property, over all or any portion of said route to the destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all of this Bill of Lading's terms and conditions in effect on the date of shipment including, but not limited to, the "Terms and Conditions" listed on the back side of this Bill of Lading.

SHIPPER

NEVADA INTERNATIONAL TRADE

AUTHORIZED SIGNATURE

NITCO

CARRIER

CON-WAY FREIGHT INC.

CON-WAY FREIGHT-CANADA INC.

AUTHORIZED SIGNATURE

R Bell

DATE

6/13/08

000399

NUMBER OF UNITS RECEIVED

U.S. DEPARTMENT OF HOMELAND SECURITY  
Bureau of Customs and Border Protection  
**ENTRY/IMMEDIATE DELIVERY**

Form Approved  
OMB No. 1515-0069

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
2255A RENAISSANCE DR STE 32  
LAS VEGAS-NV-89119  
702 895-7005

CST: 740  
WO1

19 CFR 142.3, 142.16, 142.22, 142.24

ABI CERTIFIED

1. ARRIVAL DATE 061308	2. ELECTED ENTRY DATE 061308	3. ENTRY TYPE CODE/NAME 06 F.T.Z.	4. ENTRY NUMBER WO1-0581647-5
5. PORT 2722	6. SINGLE TRANS. BOND	7. BROKER/IMPORTER FILE NUMBER 05-81647	
	8. CONSIGNEE NUMBER 16-1609830		9. IMPORTER NUMBER 16-1609830
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129		11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129	
12. CARRIER CODE	13. VOYAGE/FLIGHT/TRIP	14. LOCATION OF GOODS CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD	
15. VESSEL CODE/NAME FTZ0089			
16. U.S. PORT OF LANDING	17. MANIFEST NUMBER	18. G.D. NUMBER	19. TOTAL VALUE 23,400
20. DESCRIPTION OF MERCHANDISE 160 CASES OF CIGARETTES			
21. ITBL/AWB CODE	22. ITBL/AWB NO. NONPRIV	23. MANIFEST QUANTITY 160	24. H.S. NUMBER 2402208000
			25. COUNTRY OF ORIGIN CA
			26. MANUFACTURER ID. XOGRARIV2176OHS

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT

LU TRAPP ATTY-IN-FACT

PHONE NO.

702 895-7005  
FAX 702 895-7132  
DATE 6/13/08

29. BROKER OR OTHER GOVT. AGENCY USE

28. CBP USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

DELIVERY  
AUTHORIZED:

SIGNATURE

DATE

ELECTRONIC ENTRY RELEASE NOTIFICATION

PORT OF LAS VEGAS, NV

I CERTIFY THAT PROPER RELEASE FOR THIS  
CARGO HAS BEEN RECEIVED FROM US CUSTOMS  
COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL LU TRAPP

DATE 6/13/08

7/21/2008  
 WAR PATH  
 INV 10368

Nevada F.T.Z. Warehouse Withdrawal

000401  
 IDAG152053

Item #	Seneca 60's	Zone # 1006	Zone # 1007	Zone # 1013	Zone # 1014	Zone # 1015	Zone # 1016	Zone # 1017	Zone # 1019	Zone # 1020	Total
11054	Full Flavor S/P King				10						10
11055	Light S/P King				3						3
11060	Full Flavor H/L King								20		20
11061	Light H/L King								1		1
11063	Menthol H/L King								5		5
11065	Non-Filter H/L King			7				3			10
11066	Full Flavor S/P 100							10			10
11067	Light S/P 100						3				3
11068	Ultra Lt S/P 100	3									3
11070	Menthol Lt S/P 100									1	1
11072	Full Flavor H/L 100								35		35
11073	Light H/L 100			3		4					7
11074	Ultra Lt H/L 100						9	1			10
11075	Menthol H/L 100							8			8
11076	Menthol Light H/L 100						8				8
Total		3	0	10	13	4	20	22	61	1	134

Item #	Opal 30's	Zone # 1006	Zone # 1007	Zone # 1013	Zone # 1014	Zone # 1015	Zone # 1016	Zone # 1017	Zone # 1019	Zone # 1020	Total
33130	Full Flavor H/L 120			12							12
33131	Light H/L 120								15		15
33132	Ultra Lt H/L 120		15								15
33133	Menthol H/L 120		2								2
33134	Menthol Lt H/L 120	5									5
Total		5	17	12	0	0	0	0	15	0	49

Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Zone #	Total
1006	1007	1013	1014	1015	1016	1017	1019	1020		
8	17	22	13	4	20	22	76	1		183

Opal 30's	49
Seneca 60's	134

W01-0581704-4

Grand Total	183
-------------	-----



## INVOICE/BILL OF LADING

## NATIVE NATION

INVOICE # 10368

Date of Sale 18-Jul-08

Shipped Date:

Seller: Native Wholesale Supply  
PO Box 214  
Gowanda, N.Y. 14070  
Toll Free: 1-877-628-4833

Sold To War Path  
Purchaser: North 165 Highway 95  
Plummer, ID. 83851

Place of sale: Native Wholesale Supply  
10955 Logan Rd  
Perrysburg, NY 14129

Billed To: War Path  
North 165 Highway 95

Seneca Nation Territory

☐ Shipping Charges Pending

VIA Cœur d'Alene Indian Nation

Plummer, ID. 83851

## DESCRIPTION OF GOODS

Item Code	Item:	Case:	Quantity:	Price Per Unit:	Extension:
1072	SENECA Full Flavor H/L 100	60	✓ 35 1019	\$456.00	\$15,960.00 32+3
1055	SENECA Light S/P King	60	✓ 3 1014	\$456.00	\$1,368.00
1060	SENECA Full Flavor H/L King	60	✓ 20 1019	\$456.00	\$9,120.00
1061	SENECA Light H/L King	60	✓ 1 1019	\$456.00	\$456.00
1063	SENECA Menthol H/L King	60	✓ 5 1019	\$456.00	\$2,280.00
1065	SENECA Non Filter H/L King	60 7+3	✓ 10 1013-1017	\$456.00	\$4,560.00
1066	SENECA Full Flavor S/P 100	60	✓ 10 1017	\$456.00	\$4,560.00
1067	SENECA Light S/P 100	60	✓ 3 1016	\$456.00	\$1,368.00
1054	SENECA Full Flavor S/P King	60	✓ 10 1014	\$456.00	\$4,560.00
1070	SENECA Menthol Lt S/P 100	60	✓ 1 1020	\$456.00	\$456.00
3134	OPAL Menthol Lt H/Lid 120's	30	✓ 5 1006	\$262.50	\$1,312.50
1073	SENECA Light H/L 100	60 3+4	✓ 7 1013-1015	\$456.00	\$3,192.00
1074	SENECA Ultra Lt H/L 100	60 9+1	✓ 10 1016-1017	\$456.00	\$4,560.00
1075	SENECA Menthol H/L 100	60	✓ 8 1017	\$456.00	\$3,648.00
1076	SENECA Menthol Lt H/L 100	60	✓ 8 1016	\$456.00	\$3,648.00
3130	OPAL Full Flavor H/Lid 120's	30	✓ 12 1013	\$262.50	\$3,150.00
3131	OPAL Light H/Lid 120's	30	✓ 15 1019	\$262.50	\$3,937.50
3132	OPAL Ultra Lt H/Lid 120	30	✓ 15 1007	\$262.50	\$3,937.50
* 3133	OPAL Menthol H/Lid 120's	30	✓ 25 1007	\$262.50	\$1,312.50
1068	SENECA Ultra Lt S/P 100's	60	✓ 3 1006	\$456.00	\$1,368.00

\* 3133 OPAL MENTHOL, ONLY 2 CASES IN STOCK

32-1500  
32-1500  
32-1326  
42-1040  
24-1046  
21-722

183





**U.S. DEPARTMENT OF HOMELAND SECURITY**  
**Bureau of Customs and Border Protection**

Form Approved  
OMB No. 1515-0048

**ENTRY/IMMEDIATE DELIVERY**

PAGE 1 OF 1

PAPERLESS ENTRY

GENE C MACK, CHB  
2255A RENAISSANCE DR STE 32  
LAS VEGAS-NV-89119  
702 895-7005

CST: 740  
W01

19 CFR 142.2, 142.16, 142.22, 142.24

ABI CERTIFIED

1. ARRIVAL DATE 072108		2. ELECTED ENTRY DATE 072108		3. ENTRY TYPE CODE/NAME 06 F.T.Z.		4. ENTRY NUMBER W01-0581704-4	
5. PORT 2722		6. SINGLE TRANS. BOND		7. BROKER/IMPORTER FILE NUMBER 05-81704			
		8. CONSIGNEE NUMBER 16-1609830				9. IMPORTER NUMBER 16-1609830	
10. ULTIMATE CONSIGNEE NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129				11. IMPORTER OF RECORD NAME NATIVE WHOLESALE SUPPLY CO 10955 LOGAN RD PERRYSBURG, NY 14129			
12. CARRIER CODE		13. VOYAGE/FLIGHT/ITRIP		14. LOCATION OF GOODS CODE(S)/NAME(S) Z179 FTZ 89 - NEV. NAT'L TRAD			
15. VESSEL CODE/NAME FTZ0089							
16. U.S. PORT OF LANDING		17. MANIFEST NUMBER		18. C.O. NUMBER		19. TOTAL VALUE 23,304	
20. DESCRIPTION OF MERCHANDISE 183 CASES OF CIGARETTES							
21. HTS CODE	22. HTS SUBCODE	23. MANIFEST QUANTITY	24. H.S. NUMBER	25. COUNTRY OF ORIGIN	26. MANUFACTURER ID.		
	NONPRIV	183	2402208000	CA	XOGRARIV2176OHS		

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

**28. CBP USE ONLY**

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CBP EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

SIGNATURE OF APPLICANT  
*Kay Rolofson* KAY ROLOFSON ATTY-IN-FACT

PHONE NO. 702 895-7005 DATE 7/21/08  
FAX 702 895-7132

29. BROKER OR OTHER GOVT. AGENCY USE

LOT#	CASES	REF#
1006	8	1020 1
1007	17	
1013	22	
1014	13	
1015	4	
1016	20	
1017	22	
1019	76	

IDAG152056

DELIVERY AUTHORIZED:	SIGNATURE	DATE
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ELECTRONIC ENTRY RELEASE NOTIFICATION  
PORT OF LAS VEGAS, NV

I CERTIFY THAT PROPER RELEASE FOR THIS  
CARGO HAS BEEN RECEIVED FROM US CUSTOMS  
COMPANY GENE MACK LAS VEGAS

AUTHORIZING OFFICIAL KAY ROLOFSON

DATE 7/21/08 000404

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**Attorneys for the State of Idaho**

**THEODORE V. SPANGLER, JR., ISB #1318  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844**

**Attorneys for the Idaho State Tax Commission**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**NOTICE OF SERVICE**

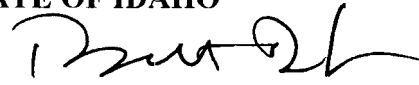
Plaintiffs The State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission, (collectively "State of Idaho"), pursuant to Rule 36(c)(2) of the Idaho Rules of Civil Procedure, hereby give notice that the State of Idaho caused to be

served the State Of Idaho And The Idaho State Tax Commission's Responses To Defendant's  
First Set Of Requests For Admissions.

DATED this 23<sup>rd</sup> day of June, 2009.

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By



**BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division**

**IDAHO STATE TAX COMMISSION**

By



**THEODORE V. SPANGLER, JR  
Deputy Attorney General  
State Tax Commission**

## CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of June, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



BRETT T. DELANGE  
Deputy Attorney General

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *up*

**JUN 25 2009**

**J. DAVID NAVARRO, Clerk**  
By **E. HOLMES**  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S MEMORANDUM**  
**IN RESPONSE TO PLAINTIFFS'**  
**MOTION FOR PRELIMINARY**  
**INJUNCTION**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and responds to Plaintiffs the State of Idaho ("The State") and the Idaho State Tax Commission's ("Tax Commission") Motion for Preliminary Injunction.

The Plaintiffs are not entitled to an injunction because the Idaho Tobacco Master Settlement Agreement Act ("Idaho MSA Act") and the Complementary Act, Idaho Code § 39-804, do not apply

*K/S*

to the tribal-to-tribal transactions the State seeks to regulate and any regulation is barred by the Indian Commerce Clause and/or the Tribal Sovereignty Doctrine, the Plaintiffs have not suffered irreparable harm, and the Plaintiffs cannot meet the prerequisites for granting of an injunction.

**I.**

**FACTS**

The Complaint generally alleges that NWS is illegally selling, distributing or importing cigarettes in Idaho and seeks to enjoin NWS from continuing its actions and also seeks the imposition of monetary sanctions. The reality is that the Plaintiffs are attempting to enjoin Indian to Indian commercial transactions, which they cannot do.

The following facts are contained in the Affidavit of Arthur Montour filed in support of NWS's Motion to Dismiss, and are uncontroverted:

In or around 2001, NWS was chartered as a corporation by the Sac and Fox Tribe of Oklahoma. (Montour Aff. ¶ 2). NWS's office has always been located on Seneca Nation of Indians Territory in northern New York. (*Id.*) NWS has no other office. (*Id.*)

The primary business of NWS is the importation and sale of tobacco products. (Montour Aff. ¶ 3) NWS imports cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. ("Grand River") for resale to third parties. (*Id.*) Grand River is wholly owned by Native Americans who are members of the Six Nations that comprise the Iroquois Confederacy. (*Id.*) Grand River is a Canadian corporation that produces, packages and sells tobacco products. (*Id.*) Grand River's facility is located on the Grand River Reserve in Oshweken, Ontario, Canada. (*Id.*)

NWS purchases and imports cigarettes from Grand River that are shipped to their ultimate destination on Indian territory in the United States via one of three facilities: (a) the Western New York Foreign Trade Zone in Lackawanna, New York; (b) the Southern Nevada Foreign Trade Zone in Las

Vegas, Nevada; and (c) a bonded warehouse on the Seneca Nation of Indians Territory in New York. (Montour, Aff. ¶ 4) NWS does not own any of these facilities, but merely rents space to store the cigarettes after they pass through Customs. (*Id.*)

As mentioned above, NWS resells the cigarettes only to tribes or entities in the United States that are located on tribal land and owned by Native Americans. Cigarettes are sold only to tribes or entities that are located on trust land and which are owned by individuals who are enrolled members of federally recognized tribes. (Montour Aff. ¶ 5). All orders are placed and processed at NWS's office on the Seneca Nation of Indians Territory. (*Id.*) All checks or other forms of payment are remitted or forwarded to NWS's office. (*Id.*) All cigarettes sold by NWS are in packages that are stamped "for reservation sales only." (*Id.*)

All cigarettes sold by NWS are (and have always been) sold at all times on an F.O.B. Seneca Nation of Indians Territory basis, with title and risk of loss transferring to the purchaser at the time of sale on the Seneca Nation of Indians Territory. (Montour Aff. ¶ 6) Once a transaction is completed, products are shipped via one of the three aforementioned facilities. (*Id.*) NWS does not exercise any control over its products subsequent to their sale to third parties. (*Id.*) NWS does not sell or import any cigarettes into the State of Idaho. (*Id.*) Any transport of products into Idaho occurs solely as a result of a third party's conduct or direction. (*Id.*)

The Plaintiffs have no proof that NWS has sold any cigarettes in Idaho. All evidence submitted by the Plaintiffs merely reflects NWS's resale of cigarettes to tribes or entities located on trust land and which are owned by individuals or owned by members of federally recognized tribes. The proof again simply shows orders being placed and processed at NWS's office on the Seneca Nations of Indian Territory and sold FOB Seneca Nations of Indian Territory Basis. At no time do the cigarettes enter land in Idaho which is not within the Coeur d'Alene Indian Reservation. In fact, the cigarettes enter the

Coeur d'Alene Indian Reservation from the State of Washington and at no time do they leave the Coeur d'Alene reservation.

## II.

### **LEGAL ARGUMENT**

As discussed in NWS' Motion to Dismiss based on lack of personal and subject matter jurisdiction, the Court does not need to consider the preliminary injunction matter once it finds there is no jurisdiction. If, however, the Court is inclined to consider this matter, the law cited below makes clear there is no basis for a preliminary injunction.

#### **A. Rule 65.**

The State relies upon Rule 65(e) as the basis for its request for injunctive relief. This Rule states that a preliminary injunction may be granted:

- (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

One who seeks an injunction has the burden of proving his right to it. *Harris v. Cassia County*, 106 Idaho 513, 518 (1984). While the determination of whether to grant or deny a preliminary injunction under I.R.C.P. 65(e) is a matter for the discretion of the trial court, a preliminary injunction "is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Brady v. City of Homedale*, 130 Idaho 569, 572 (1997) (quoting *Harris*, 106 Idaho at 518). "The discretionary power vested in the court to grant injunctive relief . . . is not an arbitrary one; it is a sound and legal discretion which should be exercised with great caution[.]" *Mountain States Tel. & Tel. Co. v. Jones*, 75 Idaho 78 (1954).

Plaintiffs assert that where the government seeks preliminary injunctive relief, special rules apply. (Plaintiffs' brief at 7-8). They cite cases from Ohio, Texas and Indiana and some federal cases.



Nowhere do they mention Idaho cases because no Idaho authority supports their assertion that the state need not meet the same requirements as any other litigant seeking a preliminary injunction. No Idaho case law supports their view that the state need not show irreparable injury for which there is no adequate remedy at law. To the contrary, cases involving governmental entities in Idaho which were seeking injunctive relief are governed by the same standards as all other cases. *See, e.g., Ada County v. Fuhrman*, 140 Idaho 230, 918 P.3d 1134 (2004); *School District No. 351 Oneida County v. Oneida Ed. Ass'n*, 98 Idaho 486, 567 P.2d 830 (1977). If the Court were to consider public policy concerns, it should recognize that the Plaintiffs' Motion for a Preliminary Injunction is simply a tactical move to try to get around the procedural protections NWS would be entitled to if the Plaintiffs attempted to move for summary judgment. NWS would be entitled to discovery and depositions to obtain facts regarding the Plaintiffs' arguments.

Moreover, this Court should recognize as a matter of public policy that the State never invited tribal entities to participate in the MSA and moneys received in the settlement do not go to the tribes or reservations. The State therefore has no substantial interest in regulating Indian to Indian tobacco transactions.

While the decision on granting injunctive relief is a discretionary one, the Idaho Supreme Court has stated: "Obviously that discretion must be exercised with caution. Such an injunction can be granted only after a full hearing and a showing of a clear right thereto." *Farm Serv. v. United States Steel Corp.*, 90 Idaho 570, 587 (1966). A party requesting a preliminary injunction under I.R.C.P. 65(e)(1) must "demonstrate that based on their complaint, they [are] likely to prevail at trial." *Harris v. Cassia County*, 106 Idaho 513, 518 (1984). The "substantial likelihood of success necessary to demonstrate" that a party is entitled to the relief it requests "cannot exist where complex issues of law or fact exist which are not free from doubt." *Id.* Under I.R.C.P. 65(e)(2), a preliminary injunction "is

granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.” *Brady v. City of Homedale*, 130 Idaho 569, 572 (1997) (quoting *Harris v. Cassia County*, *supra*). In other words, where the facts or the law are unclear, preliminary injunctive relief should not be granted. It would be inappropriate to grant extraordinary relief where the law is unclear, as it is in this case.

**B. Plaintiffs cannot show they have a substantial likelihood of success.**

Plaintiffs’ request for injunctive relief relies on the applicability of the MSA and the Complementary Act to NWS. As Plaintiffs have the burden of proving their right to injunctive relief, they have the burden of proving that NWS is subject to these Acts. This they cannot do. As their claim of right is not free from doubt, they have not carried their burden of proof under Rule 65(e) (1) to show a substantial likelihood of success. *Harris*, 106 Idaho at 518.

NWS, owned by a Native American and chartered by an Indian tribe, sells solely to entities located on tribal land and owned by Native Americans and is engaged in tribal-to-tribal transactions. Plaintiffs seek to enforce the Idaho Tobacco Master Settlement Agreement Act (“Idaho MSA Act”) or the Complementary Act, Idaho Code § 39-8401, upon these tribal-to-tribal transactions, which is beyond the scope of clear language of the statute.

In November 1998, Idaho entered into a Master Settlement Agreement with the largest United States cigarette manufacturers, thus concluding multi-state tobacco litigation in which Idaho was a party. Pursuant to the MSA, Idaho adopted uniform legislation requiring non-MSA signatories that sold cigarettes in any MSA state to either join the MSA or to fund a qualified escrow, Idaho Code § 39-7803(b), of the Idaho Tobacco Master Settlement Agreement. The Act required non-participating manufacturers to place into a qualified escrow fund a prescribed sum of money “per unit sold” in Idaho. Idaho Code § 39-7803(b)(1) “Units sold” is the number of individual cigarettes sold in Idaho by

the tobacco product manufacturer during the year in question, “as measured by excise taxes collected by the state on packs ... bearing the excise tax stamp of the state ....” Idaho Code § 39-7802(j).<sup>1</sup> The excise tax is levied pursuant to the Cigarette and Tobacco Products Tax statute, Idaho Code § § 63-2501, *et seq.* The Act defines wholesaler as every person who “purchases, sells or distributes cigarettes to other wholesalers or to retailers for the purpose of resale.” Idaho Code § 63-2502(a). The statute requires Idaho cigarette stamps to be affixed to each individual package of cigarettes to evidence payment of the excise tax. Idaho Code § 63-2507 provides that “no cigarettes may be purchased, sold, distributed, stored or held on hand or in possession of any person without Idaho stamps having been affixed thereto ....” Idaho Code § 63-2508. The unambiguous language of the statutes ties the calculation of the number of “units sold” to the imposition of the excise tax on the cigarettes sold. Thus, if no excise tax is assessed, no “units” are sold in Idaho for the purposes of the MSA statute and the Complementary Act.

Idaho does not collect excise taxes from cigarette sales on tribal land. Although Idaho generally is entitled to impose an excise tax on cigarettes sold within the state, the Doctrine of Sovereign Immunity prohibits Idaho from suing any Indian Tribe to compel collection of state sales and excise taxes on sales of cigarettes made in Indian Country. *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). “Indian Tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Id.* at 509. Thus, the Doctrine of Sovereign Immunity bars suits against Indian tribes. *Id.* Although an Indian tribe is sovereign immunity limits neither the state’s authority to tax sales of cigarettes to non-members of the tribe on tribal land or the tribe’s obligation to assist in the collection of a validly imposed tax, sovereign immunity denies the state a judicial avenue to compel a tribe to

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<sup>1</sup> “Units sold” in the Idaho Complementary Act has the same meaning as that term is defined in the MSA Act. Idaho

comply with these obligations. *Id.* at 512-13. The Supreme Court of the United States concluded that instead of suing the tribe, a state could enforce its tax laws by entering in agreements with tribes to “adopt a mutually satisfactory ‘solution’.” *Id.* at 514. However, the imposition of a tax on reservation sales of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians, was nothing less than a direct tax upon commerce with Indian tribes and, as such, was not permissible absent congressional consent. *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P.2d 187 (1973), cert. denied, 4419 U.S. 1089, 95 S.Ct. 679, 42 L.Ed.2d 681 (1973). The Idaho Supreme Court has also stated that when Congress does not instruct otherwise, a state’s excise taxes is unenforceable if its legal incidence falls on a tribe or its member for sales made within Indian Country. *Goodman Oil Co. of Lewiston v. Idaho State Tax Commission*, 136 Idaho 53, 28 P.3d 996 (2001), cert. denied, 534 U.S. 1129, 122 S.Ct. 1068, 151 L.2d, 971 (2001). As former Attorney General Larry Echohawk observed in his article “Balancing State Tribal Power to Tax in Indian Country,” 40 Idaho L.Rev. 623, 648 (2004), *Goodman Oil* “demonstrates a continuing commitment to broad views of tribal sovereignty.”

In light of this law, Idaho does not collect excise taxes from cigarette sales on tribal land. Accordingly, the MSA Act and Complementary Act, which apply only to “units sold,” the calculation of which relies on the excise tax imposed, cannot by their express terms apply to cigarettes sold on tribal land on which no excise tax is levied.

Indeed, the State of Idaho by and through Attorney General Wasden asserted this exact point in its brief to this Court in support of its motion to enforce the Master Settlement Agreement against the tobacco company defendants. As seen in the relevant pages of its brief filed on April 25, 2006, in Case No. CV OC 97-03239D, attached to NWS’ Memorandum in Support of its Motion to Dismiss, the State stated: “In Idaho, no excise tax is collected on cigarettes sold in interstate commerce, on military

reservations, by Indians on Indian reservations, so these sales are excluded from ‘Units Sold’.” Thus, the State of Idaho is judicially estopped from taking another position in the current litigation.

Moreover, Plaintiffs are bound by their position asserted in the brief filed by the Attorneys General of various states, including Idaho Attorney General Lawrence Wasden, in a New York federal case between those states and certain Indian tobacco manufacturers. *Grand River Enterprises Six Nations, Ltd. V. William Pryor, et al.*, 02 CV 5068 (S.D.N.Y.) (a copy is attached for the Court’s convenience). In that brief, Attorney General Wasden for the State of Idaho stated on page 16:

Plaintiffs’ Indian Commerce Clause claim is similarly without merit. An NPM’s escrow obligation arises solely from the sale of its cigarettes off-reservation. It is well-settled that a state can regulate (i) off-reservation transactions conducted by Native Americans; (ii) on-reservation sales to persons other than Native Americans; and (iii) impose certain requirements upon Native Americans in regulating those sales. Dep’t of Taxation & Finance v. Attea, 512 U.S. 61 (1994) (New York can impose cigarette tax on sale of cigarettes that occur on reservation to non-Native American, and can require Native American sellers to comply with certain record keeping requirements pertaining to all transactions); Washington v. Confederated Tribes of Colville Reservations, 447 U.S. 134 (1980).

The brief was so persuasive the Federal District Court adopted its reasoning:

Even if this suggestion is accepted as true and sufficient for coverage, an NPM’s escrow obligation arises solely from its sales of cigarettes occurring off-reservation. It is well-settled that a state can regulate (i) off-reservation transactions conducted by native Americans; (ii) on-reservation sales to persons other than Native Americans; and (iii) impose certain requirements upon Native Americans in regulating those sales. Dep’t of Taxation & Finance v. Attea, 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994); Washington v. Confederated Tribes of Colville Reservations, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

*Grand River Enterprises v. Pryor*, 2003 WL 22232974 (S.D.N.Y. 2003) (a copy is attached for the Court’s convenience).

Thus the Plaintiffs are bound by their assertion that the state can only regulate off-reservation transactions between Native Americans and by their assertion that any escrow obligation “arises solely

from the sale of . . . cigarettes off-reservation.” As this is not the situation in the present case, the Idaho Tobacco Acts do not apply to NWS.

Plaintiffs also assert that injunctive relief is proper under the tax statutes, as NWS does not have a wholesaler permit. Again, while this argument sounds plausible in the abstract, the reality is that NWS does not come within the scope of the Idaho Statutes. NWS is not a “wholesaler” within the statutory definition because it does not sell or distribute cigarettes in Idaho, and the Idaho tax statute can only apply to Idaho, not New York, or any other state.

To conclude otherwise would be to sanction a due process violation as well as a violation of the Interstate Commerce Clause. It would allow one state to require preauthorization for interstate commerce.

The United States Supreme Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), stated that in the “special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.” If the Tax Commission attempts to argue that any NWS transaction occurred in Idaho, it is then defeated by the fact it must be on-reservation and accordingly not subject to regulation.

The Idaho MSA Act and the Complementary Act and the Cigarette Tax Act do not apply to cigarettes sold by NWS to tribal entities on tribal lands. Therefore, NWS cannot as a matter of law have violated the MSA Act or the Complementary Act and thus injunctive relief based on alleged violations of these Acts cannot be granted.

**C. The Plaintiffs have not suffered great or irreparable harm.**

District courts are required to issue an injunction only where irreparable injury is actually threatened. *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 1007, 739 P.2d 301, 306 (1987). *See also Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997).

Even if the MSA or Complementary Act applied to NWS, the Plaintiffs still would not be entitled to injunctive relief because they have not shown great or irreparable harm. Indeed, they have not even suggested what the irreparable harm might be. The only thing that Plaintiffs seem to focus on is the loss of tax revenues, a monetary issue which can obviously be remedied by monetary means if the Court finds that it actually has jurisdiction and finds in favor of the Plaintiffs after trial. Monetary damage does not constitute irreparable harm. *See, e.g., Cotter v. Desert Palace, Inc.*, 880 F.2d 1142 (9<sup>th</sup> Cir. 1989) (injuries compensable in monetary damages “not normally considered irreparable”); *Liberty Lincoln-Mercury v. Ford Motor Co.*, 562 F.3d 553 (3d Cir. 2009).

The Plaintiffs assert an interest in public health but this case is not about banning cigarettes or even regulating the contents of cigarettes. It is not about restricting young people from obtaining cigarettes. It is not about placing warning labels on packaging. It is, rather, purely and simply about money – money which can repaid if and when the Court makes a final decision after trial. There is no need for injunctive relief, and there is no basis for injunctive relief as the Plaintiffs have not suffered injury which is irreparable by monetary means, nor have they proven “great” harm.

**III.**

**CONCLUSION**

Plaintiffs have not shown they are entitled to injunctive relief. They have not shown a strong likelihood of success on the merits because the MSA and Complementary Act do not apply to NWS. They have not shown great or irreparable harm.

Accordingly, NWS respectfully requests the Court to deny Plaintiffs' motion for a preliminary injunction and award fees to NWS.

DATED this 25 day of June, 2009

**EBERLE, BERLIN, KADING, TURNBOW,  
& MCKLVEEN, CHARTERED**

By Neil M. Diddle for  
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 25 day of June, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

THEODORE V. SPANGLER, JR., ISB #1318  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844

Attorneys for the Idaho State Tax Commission

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,

Defendant.

Case No. CV OC 0815228

PLAINTIFFS STATE OF IDAHO  
AND THE IDAHO STATE TAX  
COMMISSION'S REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:44

JUN 30 2009

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

PLAINTIFFS STATE OF IDAHO AND THE IDAHO STATE TAX COMMISSION'S  
REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION - 1

ORIGINAL

## INTRODUCTION

Defendant Native Wholesale Supply Company (“Native Wholesale”) opposes the State of Idaho’s (“the State”), and the Idaho State Tax Commission’s (“Tax Commission”) motion for a preliminary injunction. In short, the State’s and the Tax Commission’s motion for a preliminary injunction seeks to end Native Wholesale’s systematic and systemic violations of Idaho’s tobacco sales and cigarette tax laws that continue even now.

Native Wholesale’s response is mostly to quote, verbatim, from its memorandum in support of its motion to dismiss. The State and the Tax Commission have already responded to these arguments, erroneous as they are, and there is no need to re-argue them here in this reply. There are two arguments made to which the State and the Tax Commission will respond: (1) Native Wholesale’s contention that the State must prove irreparable harm, has failed to do so here, and thus the Court should deny the preliminary injunction motion; and (2) Native Wholesale does not need to obtain a cigarette tax permit and even if it did such a requirement would violate the Commerce Clause of the United States Constitution. These arguments are wrong as a matter of law and fact.

## ARGUMENT

### **I. THE CONSUMER PROTECTION ACT AUTHORIZES THIS COURT TO ISSUE A PRELIMINARY INJUNCTION BASED ON NATIVE WHOLESALE’S CONTINUED VIOLATION OF THE COMPLEMENTARY ACT**

Idaho Code Section 38-8406(5) of the Complementary Act states that a person who violates Section 38-8403(3) of the Complementary Act “engages in an unfair and deceptive trade practice in violation of the Idaho consumer protection act.” This is significant because the Attorney General, separate from Rule 65(e), I.R.C.P., is authorized under the Consumer Protection Act to seek a variety of equitable remedies, including, expressly, obtaining

preliminary injunctive relief.<sup>1</sup> Because the State has established Native Wholesale's repeated and ongoing violations of the Complementary Act, evidence which Native Wholesale does not refute, the State is entitled, statutorily, to the entry of a preliminary injunction as provided for by law.

**A. The State Does Not Need to Show Irreparable Harm As A Result Of Native Wholesale's Violations Of Idaho Law**

In support of its motion for a preliminary injunction, the State cited to multiple judicial precedents that in instances where there is evidence of statutory violations and there is express statutory authorization for the entry of a preliminary injunction to enjoin such violations, the State is not under an obligation to show irreparable harm. State's Memorandum in Support of Preliminary Injunction, pp. 7-8. In response, Native Wholesale disagrees, citing to two decisions—Ada County v. Fuhrman, 140 Idaho 230, 918 P.2d 1134 (2004) and School District No. 351 Oneida County v. Oneida Ed. Ass'n., 98 Idaho 486, 567 P.2d 830 (1977)—for the proposition that the Government must show irreparable harm when it seeks a preliminary injunction. The cases do not mandate this conclusion, at least for this case, pursuant to the facts and applicable law here.

In Ada County, the County sued defendants to enjoin their actions in violation of the County's Building Code. As part of its case, Ada County submitted affidavits showing how defendants were in violation of the Building Code and how those violations could negatively impact a local canal. 140 Idaho at 233-34, 918 P.2d at 1137-38. The district court ruled that the

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<sup>1</sup> Section 48-606(1)(b) of the Consumer Protection Act authorizes the Attorney General to bring an action, in part, to enjoin any method, act, or practice that violates any provision of the Act. Preliminary and permanent injunctions are expressly authorized by Section 48-606. Idaho Code Section 48-607(1) of the Consumer Protection Act further expressly authorizes the Court to "[m]ake such orders or judgments as may be necessary to prevent the use or employment by a person of any method, act or practice declared to be a violation of the provisions of this chapter.

affidavits were sufficient to support a finding of irreparable harm and the Idaho Supreme Court, on appeal, affirmed that decision. *Id.* Whether Ada County had to prove irreparable harm as part of its case was not at issue; the Supreme Court did not state that irreparable harm is required in all instances in which violations of a law have been established, only that in this case such evidence was present and the district court did not err in its findings on the subject.

In the Oneida Ed. Ass'n case, the Idaho Supreme Court ruled that the district court erred in enjoining teachers from striking after the lower court held “what was effectively an *ex parte* proceeding.” 98 Idaho at 491, 567 P.2d at 835. The Supreme Court stated that “mere illegality of an act does not require the automatic issuance of an injunction,” *id.*, 98 Idaho at 490, 567 P.2d at 834, and that the lower court’s granting of injunctive relief, as a matter of law, was in error. The Court did not rule that irreparable harm was necessary only that the automatic entry of an injunction was error.

Neither Ada County nor Oneida Ed. Ass'n undercut the State’s request; neither stands for the proposition that the State must prove irreparable harm when it seeks injunctive relief, pursuant to express statutory authorization, to stop systematic and ongoing violations of Idaho law. Contrary to Oneida Ed. Ass'n, the State does not seek a preliminary injunction pursuant to an *ex parte* hearing. Rather, it has filed unrefuted evidence of Native Wholesale’s illegal conduct and noticed up its request for hearing. And, like the Ada County case, while not required to do so, it has provided evidence of Native Wholesale’s violations, described below, which set forth the scope and size of those violations, and how they have impacted Idaho.

But back to Native Wholesale’s contention that in cases like this one, where there are clear statutory violations and express statutory authorization to preliminarily enjoin such violations, irreparable harm must nevertheless be shown. This simply is not the rule in many

jurisdictions. In addition to the cases cited in the State's memorandum in support of its motion for a preliminary injunction, other courts have ruled that

[i]n statutory enforcement cases where the government has met the 'probability of success' prong for the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public.

United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9<sup>th</sup> Cir. 1992); Accord Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11<sup>th</sup> Cir. 1984) ("We agree with the district court that irreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes."); United States v. Diapulse Corp., 457 F.2d 25, 28 (2<sup>nd</sup> Cir. 1972) ("The passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained. . . . No specific or immediate showing of the precise way in which violation of the law will result in public harm is required. Thus, [defendant's] claim that . . . there was no showing of irreparable injury . . . is beside the point." (citations omitted)); United States v. Hayes International Corp., 415 F.2d 1038, 1045 (5<sup>th</sup> Cir. 1969) ("Where an injunction is authorized by statute and the statutory conditions are satisfied the usual prerequisite of irreparable injury need not be established and the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury before obtaining an injunction. . . . [I]rreparable injury should be presumed from the very fact that the statute has been violated.").

The rule set forth in these cases is broadly applied in numerous jurisdictions. In short, the State is not under obligation to prove irreparable harm, because, in the words of the Ninth Circuit, "the passage of the statute is itself an implied finding by [the Legislature] that violations will harm the public." Nutri-Cology, Inc., 982 F.2d at 398.

**B. Even If The State Must Show Irreparable Harm As A Result Of Native Wholesale's Violations Of Idaho Law, It Has Done So Here**

Even if Native Wholesale were correct that the State must prove irreparable injury, which it is not, the fact is the State has presented un rebutted evidence indicating continuous and ongoing violations of cigarettes which Idaho law prohibits to be sold into this State. The evidence confirms the need for the entry of a preliminary injunction.

Irreparable injury or harm is something that cannot be redressed by a legal or equitable remedy following trial. Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3<sup>rd</sup> Cir. 1992). When a plaintiff suffers "substantial injury that is not accurately measureable or adequately compensable by money damages, irreparable harm is a natural sequel." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18 (1<sup>st</sup> Cir. 1996). The State's evidence certainly establishes these elements here.

The fact of the matter is that Native Wholesale sells and ships to Idaho cigarettes not legal to be sold in the State. The State's un rebutted evidence establishes that over 100 million cigarettes have illegally been sold and shipped into Idaho. The evidence shows that despite warnings, despite requests for compliance, indeed, even despite the filing of this lawsuit, Native Wholesale continues illegally to sell cigarettes and ship them to Idaho retailers. In short, absent being enjoined, Native Wholesale will continue to break the law and the State will incur the consequences of its illegal actions.

Native Wholesale claims this case is all about money and that the State can be repaid if and when the Court makes a final decision. Native Wholesale Memorandum Opposing Preliminary Injunction, p. 11. While it is true the State seeks civil penalties for Native Wholesale's numerous violations, this case is not about money. As the Court can discern from reviewing the complaint in this case, the State has not filed a claim for damages or taxes due.

Instead, the State seeks in its complaint to stop, by injunctive relief, and to punish and deter, by civil penalty, Native Wholesale's illegal conduct. Thus, it is clear that if the Court waits until the end of this case to enjoin Native Wholesale, the fact is that potentially millions more in illegal cigarettes will have been sold and shipped into Idaho, cigarettes for which there is no judicial mechanism to recover and remove from the State. In short, absent preliminary injunctive relief, millions more violations of Idaho law will have occurred despite Legislative authorization and provision for a judicial mechanism to stop such violations at the preliminary injunction stage.

**C. The Tax Commission Is Entitled To A Preliminary Injunction Under Idaho's Cigarette Tax Laws**

Native Wholesale's response to the Tax Commission's request for a preliminary injunction is merely to state, without citation, two things. First, that its actions in selling and shipping, at wholesale, cigarettes to retailers in Idaho does not fall within the definition of a wholesaler—the person who must obtain a cigarette permit under Idaho's cigarette tax laws. Second, that to require Native Wholesale to obtain a permit would violate the Commerce Clause of the United States' Constitution.

As to the first argument, the State and the Tax Commission have established, in its memorandum in support of a preliminary injunction, p. 13, the statutory and evidentiary basis for a preliminary injunction as a result of Native Wholesale's conduct in violation of Idaho's cigarette tax laws. Native Wholesale's non-substantive response, which is merely to say that the laws do not apply to it, does not undercut that presented by the State and the Tax Commission here.

As to the second argument, Native Wholesale does not cite one case to support its Commerce Clause argument. While the Commerce Clause generally is invoked as authority for federal legislation, the so-called dormant Commerce Clause limits the States' ability to enact



legislation that adversely affects interstate commerce. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (“[T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well”). State legislation may violate the dormant Commerce Clause if it either: (1) facially discriminates in favor of intrastate interests or (2) although facially neutral, has the “practical effect” of directly controlling “commerce occurring wholly outside that State’s borders.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989). Applying these principles here, it is clear that Idaho’s cigarette wholesaler cigarette permits requirements do not violate the Commerce Clause.

**1. Idaho’s Cigarette Permit Requirements Do Not Facially Discriminate in Favor of Intrastate Interests**

Idaho’s cigarette permit requirements grant no advantage to any intrastate corporation and are neutral in its application. This is relevant because state regulation that is evenhanded passes constitutional muster even if it imposes an incidental burden on interstate commerce, unless it can be shown that the regulation’s burden on interstate commerce is “clearly excessive” when compared to the regulation’s local benefits. *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality*, 511 U.S. 93, 99 (1994).

Idaho Code Section 63-2504 has one requirement for corporate cigarette wholesalers: either be an Idaho corporation or, if foreign corporations, hold a certificate of authority issued by the secretary of state and maintain a registered office and agent pursuant to Idaho’s corporation act. There is nothing in this requirement that favors intrastate interests. Indeed, under Idaho’s cigarette tax laws, no matter where a wholesaler resides (1) the wholesaler must obtain a permit to sell at wholesale cigarettes to retailers in Idaho; (2) Idaho retailers can obtain the wholesaler’s products; and (3) the wholesaler can sell and ship cigarettes to Idaho retailers. The cigarette tax laws require only that before a wholesaler sells cigarettes to an Idaho retailer, the wholesaler

obtain a permit from the Tax Commission. The burden of complying with this requirement is no greater on out-of-state wholesalers than it is on in-state wholesalers. Local tobacco wholesalers receive no preferential treatment under the Act, thereby making it facially neutral. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

**2. Idaho's Cigarette Tax Laws Do Not Have the Practical Effect of Directly Controlling Commerce Occurring Wholly Outside of Idaho**

Because Idaho's cigarette tax laws do not discriminate in favor of intrastate interests, the next step is to evaluate whether they have the "practical effect" of directly controlling "commerce occurring **wholly outside** the State's borders." *Healy*, 491 U.S. at 336 (emphasis added). It is important to note that an "effect" on extraterritorial commerce "does not rise to the level of a constitutionally impermissible act because it does not constitute the 'regulati[on of] commerce,' *Healy* 491 U.S. at 332, 'control [of] commerce,' *id.* at 336, 'projection of one state regulatory regime into the jurisdiction of another State,' *id.* at 337, or 'application of a state statute to [extraterritorial] commerce,' *id.* at 336, necessary to render a state statute invalid." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220 (2<sup>nd</sup> Cir. 2004) (citations omitted). As noted by the U.S. Supreme Court, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940); *see also Healy*, 491 U.S. at 345 (Scalia, J., concurring in part and concurring in the judgment) (cautioning against allowing Commerce Clause jurisprudence to "degenerate into disputes over degree of economic effect").

Applying this test here, Idaho's cigarette tax laws do not directly control commerce occurring **wholly outside** Idaho's border. The laws apply and regulate only the wholesale sale of cigarettes that are purchased by and shipped to retailers in Idaho. While the stream of commerce

flows back and forth between Native Wholesale's New York operation and Idaho retailers, such commerce occurs as much, if not more, inside Idaho's borders. In short, Healy's concerns are satisfied and Native Wholesale's Commerce Clause arguments fatally flawed.<sup>2</sup>

### **CONCLUSION**

The State and the Tax Commission respectfully request that this Court issue a preliminary injunction against Native Wholesale, enjoining it from further violating the Complementary Act, the Consumer Protection Act, and Idaho's cigarette tax laws.

DATED this 30<sup>th</sup> day of June, 2009.


**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By

  
**BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division**

**IDAHO STATE TAX COMMISSION**

By

  
**THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission**

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<sup>2</sup> The circumstances in Healy contrast neatly with those here. There, a group of brewers sued Connecticut, seeking a declaration that provisions of that State's liquor law violated the Commerce Clause. The Supreme Court agreed, noting that the law's pricing provisions operated to control prices of various alcoholic products in states outside Connecticut. 491 U.S. at 337-40. The Court stated that a State may not "deprive business and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." *Id.* at 339 (*quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986)). Native Wholesale's grievances, unarticulated as they are, fall short of this standard because Idaho's cigarette tax laws do not impede, control, or deprive Native Wholesale of business opportunities with regards to its sales and commerce with retailers in States outside Idaho. The laws are concerned solely with sales and shipments to retailers in Idaho regardless of where the wholesaler is located.

## CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of June, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



BRETT T. DELANGE  
Deputy Attorney General

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& MCKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

CO. \_\_\_\_\_  
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AM. \_\_\_\_\_ 4:25

J. DAVID LARSON, C. J.  
By BEAULIE J. JONES

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**MOTION TO STRIKE THE**  
**SECOND AFFIDAVIT OF BETH**  
**KITTLEMAN**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Motion to Strike the Second Affidavit of Beth A. Kittlemann.

NWS objects to much of the information contained in the Affidavit on the grounds that it lacking in foundation, constitutes inadmissible hearsay and contains information obtained in violation of I.R.C.P. 45(b).

OFFICIAL

This lawsuit was filed on August 14, 2008. Apparently, on December 17, 2008, January 24, 2009, Deputy Attorney General Brett DeLange served subpoenas upon non-party witnesses under the guise of an “investigative demand.” The information was sought for the purpose of furthering the State’s arguments in this case. Much of the information contained in Ms. Kittlemann’s affidavit is an alleged recapitulation of the records obtained in response to the unlawful subpoena. Idaho Rule of Civil Procedure § 45(b)(2) requires that a non-party subpoena must be served upon the opposing party at least 7 days prior to service on the non-party. The Plaintiffs failed to serve the Subpoena upon counsel for NWS, much less, provide a copy of information obtained in response until they filed their brief last week. The State’s alleged reliance upon an investigation rather than complying with the Idaho Rules of Civil Procedure is an abuse of the rules of discovery and improper gamesmanship in this litigation. The Affidavit contents are the fruit of the improper conduct and should be stricken. For this reason, NWS requests that the entire affidavit of Beth Kittlemann be struck.

The State has also submitted the deposition of Jo Anne Tornberg. The deposition was conducted on November 20, 2008, after this litigation was commenced without any notice to counsel for Defendant NWS in this proceeding. The deposition was conducted by the attorney general for the State of California. Counsel for NWS in this proceeding had no opportunity to cross-examine or participate in that deposition. The deposition is hearsay and should be stricken from the record.

Much of Ms. Kittlemann’s affidavit is her interpretation of documents and testimony and argument. Most egregious is paragraphs 19 and 20 of her affidavit. Each paragraph contains inadmissible hearsay and is completely lacking in any foundation. It is simply Ms. Kittlemann’s argument of what unsubmitted documents suggest. This portion of Plaintiffs Affidavit should be stricken as hearsay and lacking in foundation.

DATED this 30 day of June, 2009

**EBERLE, BERLIN, KADING, TURNBOW,  
& MCKLVEEN, CHARTERED**

By 

Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 30 day of June, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle



**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& MCKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

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J. DAVID L. ANDERSON, CLERK  
BY BRADLEY J. BORGES

Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S REPLY TO**  
**PLAINTIFFS' MEMORANDUM**  
**IN OPPOSITION TO**  
**DEFENDANT'S MOTION TO**  
**DISMISS ON PERSONAL**  
**JURISDICTION GROUNDS**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Reply to Plaintiffs' Memorandum opposing Defendant's Motion to Dismiss.

ORIGINAL

## I.

### INTRODUCTION

NWS incorporates its arguments and authorities presented in its briefing on subject matter jurisdiction and in opposition to Plaintiffs' request for injunctive relief. It asks the Court to recognize that the State's Complaint is fatally defective because the State cannot regulate non-Indian tribally-chartered corporations selling cigarettes to an Indian retailer on Tribal lands.

Plaintiffs assert that NWS has sold millions of cigarettes at wholesale to Warpath, Inc., an Idaho corporation located in Plummer, Idaho, which in turns sells the cigarettes to the public, and therefore "directed at its activities" toward Idaho. (Plaintiffs' brief at 1.) There is no admissible evidence establishing these facts. What is more important, and what the State fails to mention and what is uncontroverted in the record, is that NWS, a tribally-chartered entity, does not conduct any business in Idaho and has purposely kept out of Idaho. Instead, the Indian to Indian transactions are completed outside of the state and outside the jurisdiction of Idaho courts.

## II.

### LEGAL ARGUMENT

#### A. There is No Basis for Personal Jurisdiction.

In order for an Idaho court to exercise jurisdiction over an out of state defendant, two criteria must be met. The act giving rise to the cause of action must fall within the scope of Idaho's long arm statute and the constitutional standards of due process must be met. *Schneider v. Sverdsten Logging Co.*, 104 Idaho 210, 211, 652 P.2d 1078, 1079 (1983). Neither criteria is met in this case.

##### 1. NWS's actions do not fall within the long arm statute.

The Idaho long arm statute, Idaho Code § 5-514, permits the exercise of personal jurisdiction over those who do any of the acts enumerated in the statute so long as the cause of action arises from

the “doing of any of said acts.” *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 75, 803 P.2d 978, 981 (1980). Plaintiffs argue that both the “transacting business” and commission of tortious act sections apply. These allegations are incorrect.

Plaintiffs are unable to explain how dealings by an out of state tribal corporation such as NWS, which does not sell or even advertise in Idaho or have any relationship to Idaho, and an Indian corporation which purchases cigarettes outside of Idaho and brings them into an Indian reservation within the boundaries of Idaho, can be considered to be transacting business in the state. NWS does not transact business in Idaho.

Nor has NWS committed tortious acts in Idaho. Plaintiffs attempt to argue that an alleged violation of a statute (which does not apply to NWS; *see* Memorandum Regarding Lack of Subject Matter Jurisdiction) may constitute a tort on which personal jurisdiction can be based. They cite to *St. Alphonsus Regional Medical Center v. State of Washington*, 123 Idaho 739, 852 P.2d 491 (1993), for the suggestion that because the state of Washington’s actions might constitute a private tort in Idaho, somehow this suggests that violation of a statute is classifiable as a tort. The *St. Alphonsus* case dealt, of course, directly with the opposite issue: whether Washington’s actions pursuant to certain legislative authority constituted a private tort against a private company. There was absolutely nothing in that case about whether violation of a statute constituted tortious conduct under the long arm statute. Moreover, in the present case, unlike *St. Alphonsus*, the plaintiffs did not plead in the Complaint any alleged tort violation causing personal injury for which they are seeking damages.

In *St. Alphonsus*, the claim was that Washington’s actions constituted tortious interference with contract; here the only claim is that NWS allegedly violated a statute by its contract with Warpath, Inc. The *St. Alphonsus* case is inapposite and provides no support for Plaintiffs.

Plaintiffs once again are engaging in circular reasoning. They are alleging that anytime the legislature enacts a statute, the violation of that statute by persons outside of the State would constitute tortious conduct in Idaho. Such an interpretation would allow the state legislature to expand the State's personal jurisdiction to include activity anywhere under the long arm statute. This is not what the legislature intends and is not what the courts allow.

**2. The exercise of jurisdiction would violate the due process clause.**

The due process clause requires that a non-resident defendant have "fair warning that a particular activity may subject it to the jurisdiction of a foreign sovereign" and "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985). As noted before, NWS specifically structured its conduct to remain out of Idaho. It has never purposely availed itself of the privilege of conducting activities in Idaho, nor has it invoked the benefits and protection of Idaho's laws. *Schneider*, 104 Idaho at 212, 657 P.2d at 1080 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

This Court lacks specific personal jurisdiction over NWS as several elements of the minimum contacts analysis required by the Due Process Clause for determining personal jurisdiction are not satisfied in this action.

The first issue that the State has to confront is that NWS has no legally cognizable contacts with Idaho. Even under the Plaintiffs' misstatement of the facts, the only contacts NWS has with Idaho are on tribal lands, and tribal lands are outside the jurisdiction of Idaho for civil regulatory purposes.

The relevant facts are clear. NWS, a tribally-chartered entity, contracts with enrolled members of tribes, tribes or other tribally-chartered entities from NWS's New York location. Title and risk of

loss passes to those other entities in New York, and a common carrier delivers the cigarettes to Warpath, Inc. on reservation lands located within the boundaries of Idaho. Warpath, Inc., like NWS itself, is created under the auspices of a separate and distinct entity. Pursuant to Warpath's organizing articles, any shareholder must be an enrolled member of the Coeur d'Alene tribe. *See*, Exhibit "A" to Affidavit of Samuel A. Diddle filed concurrently herewith. For cigarette sales Idaho treats a tribal member and an entity entirely owned by tribal members as the same. *See* IDAPA 35.01.10.014.01. The terms of the sale to Warpath at all times were FOB Seneca Nation Territory in New York, and the purchase price for the goods includes the cost of shipping, which is borne by Warpath. There is no evidence whatsoever that NWS made sales in Idaho, or that the use of a common carrier changed NWS's "expectations," which were, and have always been, to sell cigarettes on a wholesale basis to tribal entities located on sovereign Indian land.

NWS has no minimum contacts with the State of Idaho. Rather, NWS's contacts are with other Native Americans, but all of those contacts arise on the land of the Seneca Nation which is located within the geographic boundaries of New York. The only "Idaho" contact by NWS is with the Coeur d'Alene Tribe on its reservation. Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). An Indian tribe, as a quasi-sovereign nation, possesses the right to govern on its tribal land as it sees fit. *See Bittle v. Vahe*, 119 P.3d 810, 817 (Okla. 2008). Idaho cannot intrude on the Seneca or Coeur d'Alene Tribes' rights.

The first prong of the minimum contacts inquiry is refined into two sub-elements which query whether the defendant has either (1) "purposefully availed" itself of the privilege of conducting activities in the forum or (2) "purposefully directed" its activities toward the forum. Thus, in order to satisfy the first element of the test, Plaintiffs are required to show that NWS either purposefully availed

itself of the privilege of conducting activities in Idaho, or that NWS purposefully directed its activities towards Idaho.<sup>1</sup>

In short, where the defendant has not conducted activities in the forum state, a plaintiff must prove that the defendant “(1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9<sup>th</sup> Cir. 2006).

**a. Courts Have Concluded that the Minimum Contacts Analysis Required by the Due Process Clause Applies to Tribal Lands.**

In *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878), the United States Supreme Court declared that a court which entered a judgment without personal jurisdiction violated the due process clause of the Fourteenth Amendment. Beginning with *Pennoyer*, the High Court has “relied on the principles traditionally followed by American courts in *marking out the territorial limits of each State’s authority*.” Although the minimum contacts test established by *International Shoe* is itself a fairness inquiry, the scope of that inquiry necessarily acknowledges that the constitutionality of a state’s assertion of in personam jurisdiction reflects territorial limitations on the power of an individual state. *Max Daewyler Corp. v. R. Meyer*, 762 F.2d 290, 264 (2d Cir. 1985); *see also Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 n.3 (1st Cir. 1984). One of those historical and statutory territorial limitations on a state’s power is its inability to extend its civil regulatory and adjudicatory jurisdiction to Indian reservations. *Dist. Ct. for the Tenth Judicial Dist. v. Feather*, 420 U.S. 425, 428 n. 2 (1975).<sup>2</sup>

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<sup>1</sup> Plaintiffs rely heavily on the “stream of commerce theory” to support their argument; however, “[t]he placement of product into the stream of commerce, without more is not an act purposefully directed toward a forum state.” (*Holland America Line Inc. v. Wärtsilä North America, Inc.*, 485 F.3d 450, 459 (9<sup>th</sup> Cir. 2007), *citing Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987). “Even a defendant’s awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum state.”

<sup>2</sup> The federal statutory definition of “Indian Country” includes land “within” a state. 18 U.C.S. §1151.

“The limitation on state power in Indian country stems from the Indian commerce clause, which vests exclusive legislative authority over Indian affairs in the federal government.” *Nell Jessup Newton, et al., Cohen’s Handbook of Federal Indian Law*, at p. 520, § 6.03[1][a]; *see also Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n. 1 (1998) (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States”); *Worcester v. Georgia* 31 U.S. 515, 561 (1832) (“[t]he Cherokee nation, then, is a distinct community occupying its own territory, without boundaries accurately described, in which the laws of Georgia can have no force”). Accordingly, any activities which are conducted by individuals or entities exclusively on Tribal lands cannot be said to have benefited or purposefully availed themselves of the protection of Idaho.

Contrary to the premise of Plaintiffs’ entire argument, the United States Supreme Court has stated that it has “never accepted the proposition that state lines are irrelevant for jurisdictional purposes . . . .” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 268, 291 (1980); *see also Hanson v. Denckla*, 337 U.S. 235, 251 (1958) (minimum contacts analysis is “a consequence of territorial limitations on the power of the respective States”). These limitations based on “state lines” are equally applicable to Tribal lands.

In accord with these general principles, the United States Supreme Court and other courts have repeatedly held that the “states possess limited power to assert jurisdiction on Indian land and to tax and regulate Indian affairs.” *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9<sup>th</sup> Cir. 2002); *see also Williams v. Lee*, 358 U.S. 217, 223 (1959) (state courts have no jurisdiction over a claim by a non-Indian against an Indian); *Oklahoma Tax Comm’n v. Chickasaw Nation*, U.S. 450, 458 (1995); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nations*, 502 U.S. 251, 270 (1992)

(county could not enforce its excise tax on sales of reservation land); *McLanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 179-81 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343-44 (1983) (state may not regulate hunting and fishing by non-Indians on reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (California could not regulate gaming activity by tribes on reservation lands); *Santa Rosa Bank of Indians v. King Cty.*, 532 F.2d 655, 659 (9<sup>th</sup> Cir. 1975) (“We think it unquestionable that the history of congressional dealings with the Indian trust lands is more than adequate to evidence an intent to oust state regulation over the same lands.”). Furthermore, the United States Supreme Court has concluded that general principles governing due process in the context of whether a State court has personal jurisdiction over individuals apply on Tribal lands. *Harkness v. Hyde*, 98 U.S. 476, 478 (1878) (concluding that the principles of *Pennoyer v. Neff* apply on Tribal lands).

These territorial limitations on state power vis-à-vis Tribal lands are similarly reflected in the case law concerning whether a state court has personal jurisdiction over entities and individuals and their activities which take place exclusively on Tribal lands. In sum, activities occurring only on Tribal lands do not constitute minimum contacts with Idaho for purposes of acquiring personal jurisdiction over a non-resident entity, without satisfying the minimum contacts test required by the Due Process Clause of the federal Constitution.

**b. NWS did not Purposefully Avail Itself of the Privilege of Conducting Activities in Idaho by Transporting Goods to a Tribal Entity on Tribal Lands.**

A factor which differentiates the instant case from every decision that Plaintiffs rely on is the fact that NWS does not decide the destination of the cigarettes that are shipped. Indeed, Warpath, Inc., the purchasing tribal entity, has sole discretion to determine where the cigarettes are shipped and subsequently sold after title and risk transfer F.O.B. on the Seneca Nation



reservation in New York. Indeed, NWS only ships to destinations selected by its direct purchaser, in this case to the Coeur d'Alene reservation. A number of cases have held that this lack of control over the destination of shipment is dispositive of the issue of specific personal jurisdiction.

In *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 940 (4<sup>th</sup> Cir. 1994), plaintiff asserted that the district court had specific personal jurisdiction over a cigarette filter manufacturer by virtue of the sale of cigarettes in the forum state containing its filters. The defendant manufacturer “acknowledged that, when it sold the material for cigarette filters to Lorillard, it placed the material in commerce knowing that it would eventually be sold in [the forum] as a component of . . . cigarettes.”<sup>3</sup> During the relevant time period, the defendant provided the cigarette manufacturer with 10 billion filters which were marketed and distributed through the nation. *Id.* The jurisdictional facts also showed that the defendant and cigarette manufacturer had entered into an agreement which required close cooperation to produce the cigarettes and required sharing in royalties from product development. *Id.* at 946.

On these jurisdictional facts, plaintiff argued that the cigarette manufacturer’s act of shipping cigarettes into the forum state should be imputed to the defendant. *Id.* The court concluded that this was insufficient to demonstrate minimum contacts with the forum state since “[a]ll of the listed contacts between [the cigarette manufacturer] and [defendant] relate only to [defendant’s] agreement to supply filters from its plant” to out of state facilities and “none of the

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<sup>3</sup> The fact that the manufacturer distributed a component part, rather than a final product, is immaterial “because there simply is no *per se* constitutionally significant difference between component parts and finished products.” *Jeffers v. Wal-Mart Stores, Inc.*, 152 F. Supp.2d 913, 921 (S.D.W. Va. 2001) (adding that “[i]t would be unwise for any court to conclude that, *without more*, the Due Process clause of the Fourteenth Amendment compels a finding that a plastic bottle is somehow constitutionally different from its cap or label.”).

conduct is anyway directed *toward the state of Maryland*.” *Id.* (emphasis in original); *see also Jeffers, supra*, 152 F.Supp.2d at 921 (holding that fact that defendant entity knew an intermediate entity would purchase its product and ship it into the forum state “alone is too attenuated to meet the requirements of purposeful availment”); *Lansing Trade Group, LLC v. 3B Biofuels I* {S.D. Tex. April 27, 2009) --- F.Supp.2d ---, Civil Action No. H-08-3155, 2009 WL 1140458, at \*13 (no purposeful availment where purchaser unilaterally decided where defendant shipped the products from the forum state).

Similarly, NWS sells its cigarettes FOB Seneca Cattaraugus Indian Territory. NWS has no control over the destination of the cigarettes. NWS does not solicit business in Idaho or otherwise target Idaho as a destination of its cigarettes; the cigarettes sold in Idaho, if any, are a result of unilateral acts of an independent third party over which NWS has no control; NWS does not decide whether cigarettes will be sold to consumers. NWS does not advertise in Idaho, and does not maintain offices in Idaho. It has not engaged in any contractual obligations relating whatsoever to Idaho. In sum, NWS’ shipments of cigarettes to a tribal entity on Tribal lands does not constitute purposeful availment. (Montour Decl. at ¶¶ 1-7.)

Even if NWS “transported” the cigarettes and this could be a violation of the Act, it does not mean that, *a fortiori*, specific personal jurisdiction exists. Indeed, this faulty line of reasoning has been rejected by the Ninth Circuit, since it unduly attempts to relax the requirements of due process and minimum contacts analysis. In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarian Co.*, 284 F.3d 1114, 1124-25 (9<sup>th</sup> Cir. 2002), plaintiff argued that an international convention did not require a finding of personal jurisdiction, and therefore, the court should conclude that it was not barred from hearing the action. *Id.* at 1121. In rejecting this argument, the court stated: “it is bedrock principle of civil procedure and constitutional law that a statute

cannot grant personal jurisdiction where the Constitution forbids it.” *Id.* (citations omitted). Here, Plaintiffs are arguing that this Court has personal jurisdiction because of alleged violation of the statute, in an apparent attempt to read the requirements of due process and minimum contacts out of existence. Unfortunately for Plaintiffs, Idaho cannot pass statutes that grant jurisdiction forbidden by the Constitution. Therefore, this Court should reject Plaintiffs’ argument and hold that specific personal jurisdiction over NWS does not exist in this case for the reasons outlined in this brief.

**C. NWS Did Not Purposefully Direct its Activities Toward or Conduct Activities in Idaho.**

In *North Pacific Ins. Co. v. Switzler*, 924 P.2d 839 (Or.App. 1996), the Plaintiff argued that a state court could properly assert personal jurisdiction over a non-Indian who had traveled through the state and was involved in an accident on the reservation. *Id.* at 846. In analyzing this assertion, the court initially noted that, “[a]lthough their reservation is within the exterior boundaries of Oregon, *it is not fully part of the state.*” *Id.* (emphasis in original). The court then conducted a minimum contacts analysis and concluded that the trial court lacked personal jurisdiction over the non-Indian because “passing through the state on his way to visit Warm Springs does not constitute a ‘purposeful direction’ of his activities at Oregon residents.” *Id.* at 848. The court concluded that since all activities giving rise to the claim occurred outside of Oregon on an Indian reservation, there were no cognizable minimum contacts to support specific personal jurisdiction over the non-Indian. *Id.*

This conclusion is not surprising given that a number of courts have held that contacts and activities occurring exclusively within Tribal land boundaries do not constitute contact with the state in which those lands are situated for purpose of analyzing issues of personal jurisdiction and conducting a minimum contacts analysis. *See, e.g., In re Commitment of Beaulieu III*, 737

N.W.2d 231, 235 (Minn.App. 2007); *Flammond v. Flammond*, 621 P.2d 471, 473 (Mont. 1980); *Martinez v. Super.Ct.* 731 P.2d 1244, 1246 (Ariz.App. 1987); *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1113 (Ariz. 1989).

The Ninth Circuit has also distinguished between contacts with Tribal lands and contacts with a state for jurisdictional purposes. In *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9<sup>th</sup> Cir. 1983), in deciding that jurisdiction was lacking the court determined that there were no “substantial activities giving rise to a dispute arising outside the reservation.” Therefore, the “significant contacts” test was not met. *Id.* at 985; *see also Hedreen v. Crow Tribal Housing Authority*, 521 F.Supp. 599, 606 n. 4 (D.Mont. 1981); *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980). Accordingly, NWS’ commercial activities on, and other contacts with, Tribal lands should not be considered for purposes of analyzing whether this Court has specific personal jurisdiction in this matter.

**1. Plaintiff Cannot Prove that Minimum Contacts Exist by Asserting that NWS Knew, or Should Have Known, its Conduct Limited Exclusively to Tribal Lands Would Have Effects in Idaho.**

There is no question that “most courts agree that merely asserting that a defendant knew or should have known that his intentional acts would cause harm in the forum state is not enough to establish jurisdiction under the effects test.” *IMO Industries, Inc., v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) (“we . . . agree with the conclusion reached by the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits that jurisdiction under *Calder* requires more than a finding that the harm caused by the defendant’s tort is primarily felt within the forum”). Accordingly, evidence submitted by Plaintiffs (which is inadmissible in any event) arguing that NWS merely knew or should have known that its conduct, limited to Tribal lands would have effects, or that such effects were foreseeable in Idaho, are insufficient as a matter of law to satisfy the effects test as enunciated by Idaho and federal courts. The

Plaintiffs have submitted no proof of what NWS knew or any evidence to prove what NWS should have known beyond Plaintiffs' conclusory speculation.

Moreover, the alleged "effects" of NWS' conduct is not what Plaintiffs challenge. The "harm" which so alarms the Plaintiffs is the alleged sale of cigarettes to non-Indian residents of Idaho. NWS does not sell cigarettes to non-Indian residents of Idaho; it sells to Warpath, Inc. The effects of which Plaintiffs complain are attributable to Warpath's activities alone. NWS has nothing to do with retail sales and thus cannot know or foresee any harm caused by others.

**2. Plaintiff Must Prove that NWS Expressly Aimed or Targeted its Conduct at Idaho.**

Where there is no evidence that a defendant has specifically targeted Idaho residents, that defendant's conduct outside the forum alone is insufficient to establish personal jurisdiction.

For example, in *Felix v. Kommanditgesellschaft*, 196 Cal.App.3d 106 (1988), the defendant, an automobile parts manufacturer, shipped its parts to Volkswagen which subsequently included those parts in vehicles that it sold in California. *Id.* at 116. The jurisdictional facts demonstrated that the defendant was incorporated in a foreign country, and had not "done business in California at any [relevant] time, [had] no office, affiliate, subsidiary, agent, employee, bank accounts, or business operations in this state." *Id.* The court noted that the parts and vehicles themselves were manufactured outside California. *Id.* There was also evidence before the court that defendant knew that its products were sold in California and that its products were being "currently be[ing] purchased by consumers through authorized Volkswagen dealership." *Id.*

Given these facts, the court held "that a foreign corporation must *knowingly* avail itself of the benefits accruing from its activities within the forum before jurisdiction will attach." *Id.* at 676. The court stated evidence demonstrating this included "an intent or purpose to serve the market in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing

the product through a distributor who has agreed to serve as the sales agent in the forum State.” *Id.* at 676. After applying the foregoing principles to the facts, the court concluded that “[t]he appropriate test is not knowledge or awareness or the ultimate destination of the product, but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled there” and that “[t]he contacts in this case are simply too fortuitous and tenuous to warrant the exercise of personal jurisdiction” over defendant.

NWS has no knowledge that cigarettes it sells to Warpath will be or have been sold to non-Indian residents of Idaho. There is no proof in the record of such knowledge. Indeed, the only “proof” of any such sale is the single sale created by the State for the purpose of this litigation. If non-Indians buy cigarettes from Warpath, are they residents of Idaho or Washington or Montana? The State does not know; it is not in the record, and NWS has no knowledge of any such sales.

Here, like the defendant in *Felix*, even if NWS were aware that its cigarettes were being sold to Idaho consumers on Tribal lands, Plaintiffs have submitted no evidence to show that NWS expressly targeted or aimed its conduct at Idaho by, for example, setting up distribution networks, marketing in the forum, or making direct sales to entities or consumers in Idaho. Indeed, all of Plaintiffs’ evidence is to the contrary – NWS expressly aimed and targeted its conduct to tribal entities outside of Idaho on Tribal lands. Furthermore, Plaintiffs have submitted no evidence to show that NWS had any intent or design to serve Idaho consumers, other than evidence establishing that Warpath, Inc., not NWS, sold the products to an Idaho resident. This is simply not enough to meet the minimum contacts test, or to show express aiming or intentional targeting.

NWS specifically limited its business transaction to an entity located on Tribal lands. NWS cannot be held to have purposefully availed itself of conducting or directing its activities at Idaho by virtue of the fact that some Idaho residents may have allegedly directed their activities at Tribal lands

by buying cigarettes from entities other than NWS, and then transporting them into Idaho. Again, NWS does not concede even this point as there is no proof on the record of non-Indian sales. A major distinction between the cases cited by Plaintiffs and the factual circumstances in this case is that the ultimate activity discussed therein was conducted in the forum state and targeted at forum state residents, whereas here the activity at issue was specifically conducted outside Idaho, on tribal lands, and directed at an entity which is resident of another forum. In this case, there is no admissible evidence of any non-Indian purchases except the fabricated purchase by the state investigator. Even if there were, any contact with residents of Idaho was a result of Idaho residents leaving Idaho to purchase the goods from another third-party entity, which is located on Tribal lands. In short, NWS did not come voluntarily to Idaho no matter how many Idaho residents purchased cigarettes from a third-party entity on Tribal lands. It cannot be held to have purposefully availed itself or directed its activities at Idaho, since all of those activities were directed at the Tribal forum, and entities and residents located there.

### III.

#### CONCLUSION

Plaintiffs' arguments about personal jurisdiction ignore the facts in the case. They attempt to assert jurisdiction based on a fiction that NWS transacted business and/or had any dealings with Idaho. They attempt to disguise the essential fact that the tribally-chartered corporation sells cigarettes on a wholesale basis to entities located on sovereign Indian land. No cigarettes sold by NWS are even shipped to any non-reservation land in Idaho. Plaintiffs do not appear to recognize the significance of those facts.

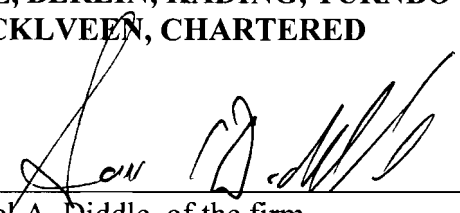
The requirements for exercise of personal jurisdiction over NWS in Idaho have not been met. It would violate the precepts of due process and the case law of Idaho and the United States Supreme Court to subject NWS to jurisdiction in Idaho.

Accordingly, NWS respectfully requests that the Court grant its motion to dismiss on the basis of lack of personal jurisdiction.

DATED this 30 day of June, 2009

**EBERLE, BERLIN, KADING, TURNBOW,  
& MCKLVEEN, CHARTERED**

By

  
\_\_\_\_\_  
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 30 day of June, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ 4:25

J. DAVID L. JONES, J.C.  
By BRAD L. JONES

Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**AFFIDAVIT OF SAMUEL A.**  
**DIDDLE IN SUPPORT OF ITS**  
**MOTION TO DISMISS FOR**  
**LACK OF PERSONAL**  
**JURISDICTION AND/OR**  
**SUBJECT MATTER**  
**JURISDICTION**

STATE OF IDAHO )  
                              : SS.  
County of Ada        )

**SAMUEL A. DIDDLE** being first duly sworn deposes and says:

1. I am one of the attorneys representing Defendant Native Wholesale Supply Company in this matter and as such have personal knowledge of the matters stated herein.

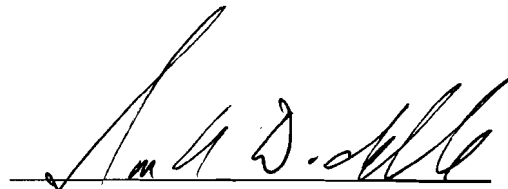
2. Attached hereto as Exhibit "A" is a true and accurate copy of the Articles of Organization of Warpath, Inc.

3. Attached hereto as collective Exhibit "B" is a true and accurate copy of maps depicting the location and boundaries of the Coeur d' Alene Indian Tribe Reservation lands.

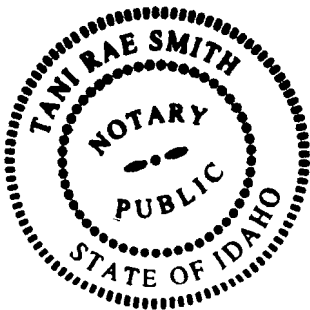
4. Attached hereto as Exhibit "C" is a copy of the State's Response to Defendant's First Request for Admissions.

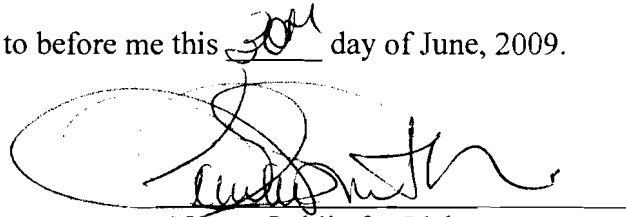
Further, your affiant sayeth not.

DATED this 30 day of June, 2009

  
\_\_\_\_\_  
Samuel A. Diddle

SUBSCRIBED AND SWORN to before me this 30 day of June, 2009.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing: Meridian, Idaho  
My Commission Expires: 3/10/11

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 30 day of June, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
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☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

FILED/EFFECTIVE

01/19/05 10:04

STATE OF IDAHO

# ARTICLES OF INCORPORATION

OF

WARPATH, INC.

The undersigned, acting as incorporator of a corporation under the Idaho Business Corporation Act, adopt the following Articles of Incorporation for such corporation:

FIRST: The name of the corporation is WARPATH, INC.

SECOND: The period of its duration is perpetual.

THIRD: The purpose or purposes for which the corporation is organized is to conduct the transaction of any or all lawful business for which corporations may be incorporated under the Idaho Business Corporation Act.

FOURTH: The aggregate amount of shares which the corporation shall have the authority to issue is One Hundred Thousand (100,000), all of one class, One Hundred Dollar (\$100.00) par value.

FIFTH: Provisions denying preemptive rights are: NONE

SIXTH: Provisions for the regulation of the internal affairs of the corporation are: All Shareholders of this corporation shall be and are enrolled members of the Coeur d'Alene Tribe, State of Idaho.

SEVENTH: The address of the initial registered office of the corporation is North 165 Highway 95, Plummer, Idaho, 83851, and the name of its initial registered agent at such address is Pete Mahoney.

EIGHTH: The number of directors constituting the initial Board of Directors of the corporation is two (2), and the names and addresses of the persons who are to serve

ARTICLES OF INCORPORATION - 1

C:\My Documents\Corporations\Warpath.Articles.doc



IDAHO SECRETARY OF STATE  
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CK: 6041 CT: 9641 IN: 427946  
1 @ 100.00 = 100.00 CORP # 2

C 141273 000456

as directors until the first annual meeting of shareholders or until their successors are elected and shall qualify are:

NAME:

ADDRESS:

Pete Mahoney

P.O. Box 609  
Plummer, Idaho 83851

Peggy A. Mahoney

P.O. Box 609  
Plummer, Idaho 83851

NINTH: The name and address of the incorporator is:

NAME:

ADDRESS:

Pete Mahoney

P.O. Box 609  
Plummer, Idaho 83851

DATED this 29 day of October, 2001.

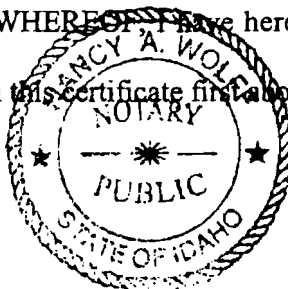
By: \_\_\_\_\_

PETE MAHONEY

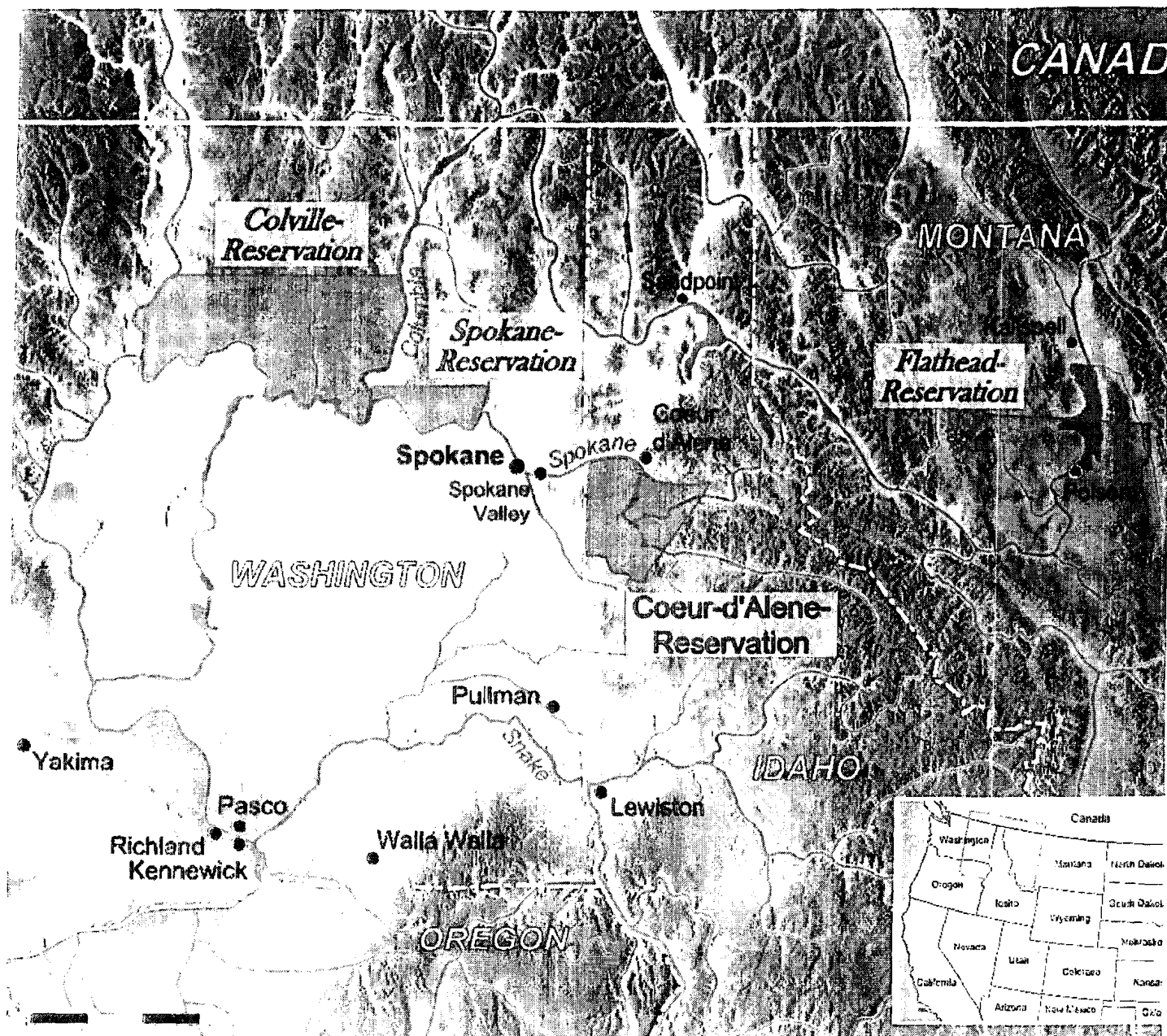
STATE OF IDAHO     )  
                              ) ss.  
County of Benewah    )

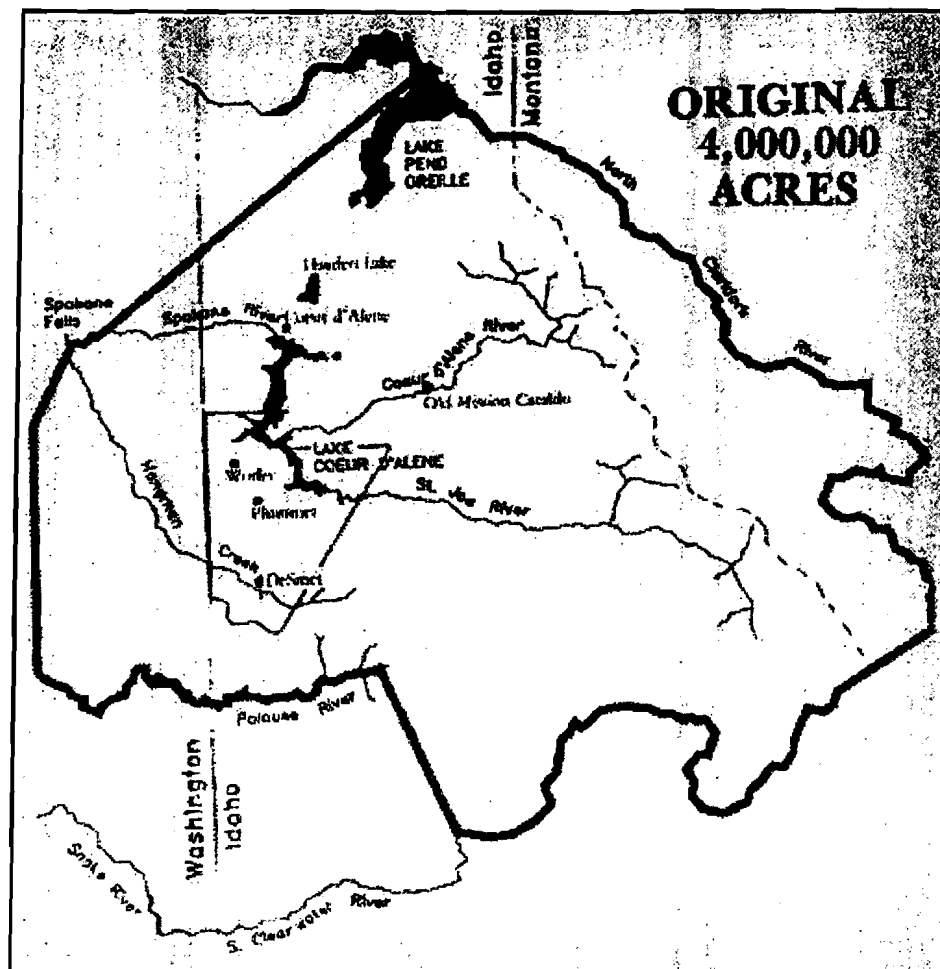
On this 29 day of October, 2001, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared Pete Mahoney, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



\_\_\_\_\_  
Notary Public in and for Idaho  
Residing at: St. Maries, Idaho  
Commission expires:





See also the [Reservation Page](#) of the Coeur d'Alene Indians' home page

[Home](#)

*Comments and questions: [David Comer](#)*

*Revised 26 Nov 2002*

*URL: <http://www.rootsweb.com/~idreserv/cdmap.html>*



**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

**Attorneys for the State of Idaho**

**THEODORE V. SPANGLER, JR., ISB #1318  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844**

**Attorneys for the Idaho State Tax Commission**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**STATE OF IDAHO AND THE IDAHO  
STATE TAX COMMISSION'S  
RESPONSES TO DEFENDANT'S FIRST  
SET OF REQUESTS FOR ADMISSIONS**



**STATE OF IDAHO AND THE IDAHO STATE TAX COMMISSION'S RESPONSES TO  
DEFENDANT'S FIRST SET OF REQUESTS FOR ADMISSIONS - 1**

**ORIGINAL**

The State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission (collectively "State of Idaho" or "Idaho"), pursuant to Rule 36(a), I.R.C.P., responds to Defendant's First Set of Requests for Admissions as follows:

### **PRELIMINARY STATEMENT**

In making these responses, Idaho reserves all objections on the grounds of competency, privilege, materiality, authenticity, admissibility, or any other grounds to the use of the information and documents it produces in this action. Idaho also reserves the right to object to any additional discovery requests in this action.

Idaho does not (and has not) assumed any improper, unproven, or hypothetical facts that may be set forth, implied, or alluded to in Defendant's discovery requests. Nor has Idaho accepted any allegations, claims, argumentative terminology, or characterizations which may be set forth, implied, or alluded to in Defendant's discovery requests.

Idaho reserves the right, but undertakes no additional obligations other than those imposed by the Idaho Rules of Civil Procedure, to supplement its discovery responses in the event it obtains or locates additional or different information or documents in the future.

**REQUEST FOR ADMISSION NO. 1:** Please admit that the State of Idaho does not assess or collect any excise tax upon any cigarettes sold by Native Wholesale Supply Company to Warpath, Inc.

**RESPONSE:** Idaho objects to this Request. It requests Idaho to admit to something which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Idaho's two claims against Native Wholesale Supply Company are for violations of the Idaho Tobacco Master Settlement Agreement Complementary Act and Idaho's cigarette tax provisions. Neither claim is dependent upon whether Idaho assesses or collects taxes on any cigarettes

Native Wholesale Supply Company has sold to Warpath, Inc. Furthermore, the request requires Idaho to assume that Warpath, Inc., at present, is a business enterprise wholly owned and operated by an enrolled member or members of an Idaho Indian tribe or is wholly owned and operated by an Idaho Indian tribe. Such foundation is missing. Without waiving these objections, Idaho answers as follows:

Idaho admits that, to date, it has not collected cigarette tax payments from Native Wholesale Supply Company. Idaho further admits that, pursuant to Rule 014, Idaho Cigarette & Tobacco Products Tax Administrative Rules, codified at IDAPA 35.01.10.014, cigarette wholesalers such as Native Wholesale Supply Company may deliver cigarettes which do not have Idaho stamps affixed to Idaho Indian reservations when the purchaser is: (1) an enrolled member of an Idaho Indian tribe; (2) a business enterprise wholly owned and operated by an enrolled member of members of an Idaho Indian tribe; or (3) a business enterprise wholly owned and operated by an Idaho Indian tribe.

**REQUEST FOR ADMISSION NO. 2:** Please admit that the State of Idaho does not assess or collect any excise tax upon Seneca or Opal brand cigarettes sold by Native Wholesale Supply Company to Warpath, Inc. when sold by Warpath, Inc.

**RESPONSE:** Please see Idaho's answer to Request for Admission Number 1. Idaho further responds that Idaho's statutory cigarette excise tax assessment and collection rules do not depend upon cigarette brands sold by a wholesaler.

**REQUEST FOR ADMISSION NO. 3:** Please admit the State of Idaho does not assess or collects any excise tax upon any Seneca or Opal brand cigarettes purchased by Warpath, Inc. from Native Wholesale Supply Company when sold by Warpath on the Coeur d'Alene Reservation land.

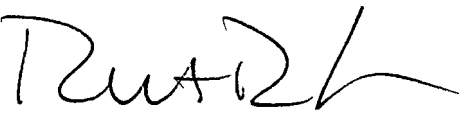
**RESPONSE:** Please see Idaho's answer to Request for Admission Number 2.

**REQUEST FOR ADMISSION NO. 4:** Please admit the State of Idaho does not assess or collect any excise tax upon any Seneca or Opal brand cigarettes purchased by Warpath, Inc. from Native Wholesale Supply Company when sold by Warpath on the Coeur d'Alene Reservation land to enrolled members of a federally recognized Indian tribe.


**RESPONSE:** Please see Idaho's answer to Request for Admission Number 2.

DATED this 25<sup>th</sup> day of June, 2009.

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

By   
**BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division**

**IDAHO STATE TAX COMMISSION**

By  for  
**THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission**

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ 4:25

J. DAVID L. ...  
By ...

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S REPLY TO**  
**PLAINTIFFS' MEMORANDUM**  
**IN OPPOSITION TO**  
**DEFENDANT'S MOTION TO**  
**DISMISS FOR LACK OF**  
**SUBJECT MATTER**  
**JURISDICTION**

COMES NOW the Defendant, Native Wholesale Supply Company (hereinafter "NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and submits this memorandum in response to the Plaintiffs' Opposition to NMW's Motion to Dismiss on Subject Matter Jurisdiction Grounds. If the Court does not dismiss this matter based on lack of personal jurisdiction, then certainly it should find there is no subject matter jurisdiction and dismiss the Complaint.

**DEFENDANT'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S**  
**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION - 1**

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I.  
**INTRODUCTION**

As did Plaintiffs in their brief on the issue of subject matter jurisdiction, NWS will incorporate the arguments and factual discussion made in its personal jurisdiction briefs into the current briefing. NWS also incorporates all arguments made in its Memorandum opposing Plaintiffs' request for injunctive relief.

II.  
**THIS COURT LACKS SUBJECT MATTER JURISDICTION**

The Court should be aware in reviewing all of the briefing by Plaintiffs and in noting all of the cases cited by Plaintiffs that not one of those cases allowed a state to regulate, prohibit or tax an exclusively tribal to tribal transaction, which is the situation in the present case. Not one court, from the Supreme Court of the United States to a state trial court, has stated that solely Indian to Indian commercial transactions can be regulated by a state. Moreover, all state statutes the State seeks to enforce in this action apply only to "Sales in this State." NWS has never made any sale in the State of Idaho. Accordingly, this Court should dismiss this Complaint.

**A. Neither the MSA Nor the Complementary Act Applies to NWS.**

Plaintiffs concede that the Idaho MSA Act does not apply to the present situation and have conceded that NWS is not violating that Act. They then argue that the Complementary Act is somehow applicable. Thus, what the State appears to be saying is that the MSA permits the transaction at issue here because it involves tribal matters on Indian Territory, but the Complementary Act which was enacted to effectuate the MSA somehow takes the opposite position. The State cannot expect the Court to support such an illogical argument.

All statutes the State seeks to apply to the sales in this case require that the sales to occur in or within Idaho. *See*, Idaho Code § 39-7802, 39-7803, 39-8403 and 39-8403(3)(b).

The Complimentary Act requires cigarette manufacturers to certify and list with the State, all cigarette brands sold “in the State.” Idaho Code § 39-8403. From this list the State publishes a directory. The Complimentary Act prohibits the sale “in this State” cigarettes not included in the directory are not taxed and are not covered by the Master Act. The State, however, seeks to enforce a statute that’s stated purpose is to compliment enforcement of the Master Act upon sales not subject to the Master Act.

The State admits that it does not assess any tax on Seneca or Opal cigarettes sold by Warpath. *See*, Exhibit C to the Affidavit of Samuel A. Diddle filed concurrently herewith. Therefore, they are not sold “in the State.” If Warpath’s sales are not “in the State” then NWS’s sale of Seneca or Opal cigarettes to Warpath are not a “sale in this State” in violation of Idaho Code § 39-8403(3)(b).

In addition to the fact that the Act cannot apply to tribal entities, as discussed below, the Complementary Act cannot apply to NWS because NWS does not “acquire, hold, own, possess, transport, import, and/or cause to be imported for sale and distribution in Idaho cigarettes.” Idaho Code §39-8403(3) (emphasis supplied). The key phrase in this statutory description is “in Idaho.” As discussed at length in NWS’ various briefs, NWS does nothing “in Idaho.” NWS does not direct its business or its activities or its advertising or its efforts toward Idaho. It has no presence in Idaho. It does not come within the parameters of the Idaho Complementary Act.

At most, the Complementary Act applies to the sale and distribution of cigarettes in Idaho. As discussed in NWS’ pleadings, the only cigarettes with which NWS is involved arrive by common carrier at the Coeur d’Alene Indian reservation – not in Idaho. Plaintiffs are attempting to enforce state law upon Native Americans, Native American-owned entities and Native American tribes for transactions occurring on tribal land. This they cannot do.

**B. This Action is Barred By the Doctrine of Tribal Sovereignty.**

**DEFENDANT’S REPLY TO PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION – 3**

The Supreme Court has long recognized that “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). “Indian tribes are unique aggregations possessing ‘attributes of sovereignty over both their members and their territory.’” *New Mexico v. Mescalero Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed. 665 (1980)) (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed. 706 (1975)). The Court has said that “[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an ‘historic immunity from state and local control.’” *Mescalero*, 462 U.S. at 332, 103 S.Ct. 2378 (citation omitted). Further, “tribes retain any aspect of their historical sovereignty not ‘inconsistent with the overriding interests of the National Government.’” *Id.* (quoting *Colville*, 447 U.S. at 153, 100 S.Ct. 2069).

The principle of tribal sovereignty has “given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members.” *Bracker*, 448 U.S. at 142, 100 S.Ct. 2578. “First, the exercise of [state regulatory] authority may be preempted by federal law.” *Id.* (citations omitted). “Second, it may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’” *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)).

When tribal sovereignty and state regulatory authority collide, courts must seek to “reconcile the plenary power of the States over residents within their borders with the semiautonomous status of Indians living on tribal reservations.” *Attea*, 512 U.S. at 73, 114 S.Ct. 1257, 36 L.Ed.2d 129 (1973)). “Resolution of conflicts of this kind does not depend on ‘rigid



rules’ or on ‘mechanical or absolute conceptions of state or tribal sovereignty ... .’” *Attea*, 512 U.S. at 73, 114 S.Ct. 2028 (quoting *Bracker*, 448 U.S. at 142, 145, 100 S.Ct. 2578). Rather, courts must undertake “a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry to determine whether, in the specific context, the exercise of state authority would violate federal law.” *Attea*, 512 U.S. at 73, 114 S.Ct. 2028 (quoting *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578).

The instant case presents a conflict between Idaho’s regulatory authority and the sovereign status of NWS and the tribal reservation located within Idaho’s borders.<sup>1</sup> The Court must reconcile these interests by conducting the type of particularized inquiry outlined above. As part of this inquiry, it is important to note that there is a “significant geographical component” to tribal sovereignty. *Bracker*, 448 U.S. at 151, 100 S.Ct. 2578. Although “the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.” *Id.*

The Complementary Act and the Tobacco Tax Act implicate tribal sovereignty insofar as they restrict or prohibit shipment or transportation of cigarettes from NWS, located outside of Idaho, to a tribal entity located on the reservation.

Under the interpretation of the Acts advanced by the Plaintiffs, wholesalers cannot ship cigarettes to reservation retailers because those retailers are located “in Idaho.” Also, common and contract carriers cannot transport wholesale shipments of cigarettes to reservation retailers.

The interests underpinning the Statutes are not implicated by these types of transactions.

---

<sup>1</sup> It should be noted that although NWS is a tribally-chartered corporation, and Warpath, Inc., is a corporation whose shareholder are members of the Coeur d’Alene tribe, operating on the Coeur d’Alene reservation, the Tribes are not parties to this action. Tribal sovereignty claims are not limited to cases in which an Indian tribe is a party. Instead, there is substantial case law that tribally-chartered corporations have the same supremacy clause-protected status as tribes. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, No. CIV. 05-3002, 2006 WL 2055880 (D.S.D. Jul. 17, 2006)

As previously discussed, although the Statutes directly regulate the shipment and transportation of cigarettes, they are clearly aimed at restricting the manner in which Idaho consumers purchase cigarettes. As such, when applied to the shipment or transportation of cigarettes to a tribal entity located on the reservation, the issue is whether Idaho may regulate the manner in which tribe members on the reservation acquire cigarettes. The Statutes do not implicate a state interest sufficient to justify that level of interference with tribal sovereignty. *See, e.g., Ward v. New York*, 291 F. Supp. 2d 188 (2003) (finding tribal sovereignty superior to state regulation of transportation of cigarettes to tribal members or a reservation).

**C. Idaho Has Not Acted to Establish State Law Jurisdiction Over Tribal Transactions on Tribal Lands.**

States have some power to exercise jurisdiction over Indian territory in some cases or if they reach an agreement with the tribe. 25 U.S.C. §1322. In this case, there is no agreement between the state and the Coeur d'Alene tribe, and Idaho has not acted to assume jurisdiction.

Indeed, the Idaho Administrative Rules specifically provide that cigarette wholesalers may deliver cigarettes without Idaho stamps to Indian reservations when:

- a. The purchaser is an enrolled member of an Idaho Indian tribe;
- b. The purchaser is a business enterprise wholly owned and operated by an enrolled member or members of an Idaho Indian tribe; and
- c. The purchaser is a business enterprise wholly owned and operated by an Idaho Indian tribe.

IDAPA 35.01.10.014.01

Warpath, Inc.'s Articles of Incorporation specifically provide that "all shareholders of this corporation shall be and are enrolled members of the Coeur d'Alene Tribe, State of Idaho."

*See*, Exhibit "A" to the Affidavit of Samuel A. Diddle filed concurrently herewith. Thus, Idaho

has specifically declined any regulatory authority over the very type of transaction on which it

now seeks to base personal jurisdiction.

**D. The State's Taxing Authority is Limited.**

The Plaintiffs' brief cites *Wagnon v. Prarie Bend Potawatomi Nation*, 546 U.S. 95 (2005), for the proposition that a state's assertion of off-reservation taxing authority is an "altogether different course" than attempts to tax on-reservation transactions. This is, of course, true. That case did state that off-reservation conduct is more appropriately taxed and regulated by a state than on reservation transactions.

Of course, however, the off-reservation conduct must be in the state which is attempting to tax it. The *Wagnon* case dealt with Kansas imposing fuel taxes on activities occurring outside of reservations but within Kansas. This is completely distinct from the state's unconstitutional attempt to regulate and tax NWS activities in selling to Warpath outside of Idaho.

**III.**

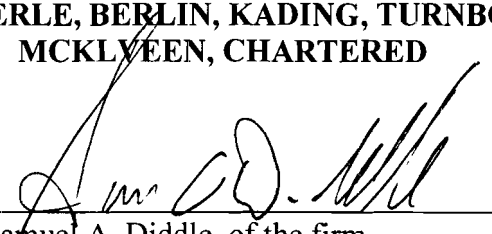
**CONCLUSION**

The Plaintiffs have not borne their burden of showing that this Court has subject matter jurisdiction. Accordingly, NWS respectfully requests the Court to dismiss Plaintiffs' Complaint.

DATED this 30 day of June, 2009

**EBERLE, BERLIN, KADING, TURNBOW,  
& MCKLYEEN, CHARTERED**

By

  
\_\_\_\_\_  
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 30 day of June, 2009, as indicated below and addressed as follows:

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Attorney General  
State of Idaho  
Brett T. DeLange  
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650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☒ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

**JUL 01 2009**

**J. DAVID NAVARRO, Clerk**  
By **L. AMES**  
DEPUTY

**LAWRENCE G. WASDEN**  
**ATTORNEY GENERAL**  
**STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)**  
**Deputy Attorney General**  
**Consumer Protection Division**  
**Office of the Attorney General**  
**954 W. Jefferson, St., Second Floor**  
**P. O. Box 83720**  
**Boise, Idaho 83720-0010**  
**Telephone: (208) 334-2424**

**Attorneys for the State of Idaho**

**THEODORE V. SPANGLER, JR., ISB #1318**  
**Deputy Attorney General**  
**Idaho State Tax Commission**  
**800 Park Boulevard**  
**P.O. Box 36**  
**Boise, Idaho 83722-0150**  
**Telephone: (208) 334-7530**  
**Facsimile: (208) 334-7844**

**Attorneys for the Idaho State Tax Commission**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through**  
**LAWRENCE G. WASDEN, Attorney**  
**General, and the IDAHO STATE TAX**  
**COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY**  
**COMPANY, a corporation, and Does 1**  
**through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**PLAINTIFFS STATE OF IDAHO AND**  
**THE IDAHO STATE TAX**  
**COMMISSION'S REPLY**  
**MEMORANDUM IN OPPOSITION TO**  
**MOTION TO STRIKE**

**PLAINTIFFS STATE OF IDAHO AND THE IDAHO STATE TAX**  
**COMMISSION'S REPLY MEMORANDUM IN OPPOSITION TO MOTION TO**  
**STRIKE - 1**

**ORIGINAL**

## **INTRODUCTION**

Defendant Native Wholesale Supply Company (“Native Wholesale”) moves to strike the Second Affidavit of Beth Kittelmann. Native Wholesale is upset with and charges the State with “gamesmanship” because it did not receive notice the State of Idaho served two third parties with civil investigative demands and subpoenas pursuant to Idaho Code Sections 48-611 and 48-612 of the Idaho Consumer Protection Act. It also objects to the Courts’ review of a certified copy of the Deposition of JoAnn Tornberg. Finally, Native Wholesale objects to Ms. Kittelmann’s statements in her affidavit. Native Wholesale’s reasons for its motion, in fact, defy reason. Assuming the Court wishes to consider Native Wholesale’s as of yet unnoticed motion, it should be denied for the following reasons set forth below.

## **ARGUMENT**

### **A. Native Wholesale’s Objections To The State’s Service Of Two Civil Investigative Demands and Subpoenas Are Without Merit**

Native Wholesale’s first set of objections relates to two civil investigative demands and subpoenas the State served upon Warpath, Inc., an Idaho customer of Native Wholesale, and Con-Way Freight, a trucking company Native Wholesale used to ship its products to Warpath. The objections are without merit for several reasons:

Idaho Code Sections 48-611 and 48-612 of the Idaho Consumer Protection Act expressly authorize the Attorney General to serve investigative demands and subpoenas “when he has reason to believe that a person has engaged in, is engaging in or is about to engage in any act or practice declared to be unlawful by this act” upon “any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation.” Idaho § 48-611(1). The Sections do not require notice to be given to the party being investigated.

The two parties that received the civil investigative demands and subpoenas—Warpath, Inc. and Con-Way Freight—are customers or providers of services to Native Wholesale. The documents Native Wholesale objects to are Native Wholesale’s own sales and billing documents, separate copies of which are no doubt in Native Wholesale’s possession, custody or control.<sup>1</sup> Native Wholesale cannot be surprised concerning the existence of these documents and what they provide and state for since Native Wholesale originated each of them in the first place.

Native Wholesale contends that the State should have utilized the provisions of Rule 45(b)(2), I.R.C.P and provided it notice of the investigative demand. There is nothing in Rule 45 or in the Consumer Protection Act that requires the State to so act. And in making this claim, Native Wholesale conveniently overlooks the fact that after being served with the State’s complaint, Native Wholesale removed it (improperly as it turned out<sup>2</sup>) to federal court. The legal consequences of this action were two-fold: once a matter is removed to federal court the State was barred from obtaining discovery pursuant to the state court action. *See* 28 U.S.C. § 1447(d); Visicorp v. Software Arts, Inc., 575 F.Supp.1528, 1531 (N.D. Cal. 1983) (“Whether or not such discovery is lodged with the state court, it is not a matter which remains with any force or effect after removal.”); Allstate Ins. Co. v. Sup Ct., 183 Ca.Rptr. 330, 333-34 (Cal.App. 1982). Further, had the State taken any affirmative action in the federal court pending its remand

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<sup>1</sup> The civil investigative demands and subpoenas are attached to the Second Affidavit of Beth Kittelmann as Exhibits D and E.

<sup>2</sup> In granting the State’s and the Tax Commission’s motion to remand this matter, the federal district court ruled that Native Wholesale did not have an objective reasonable basis for removing this matter to federal court. *See State of Idaho et al. v. Native Wholesale Supply Company*, No. 08-CV-396-S-EJL, Memorandum Decision and Order at 7-8 (D.Idaho April 6, 2009). A true and correct copy of the federal court’s decision is attached to the memorandum.

motion, such as pursued discovery, it would have been deemed to have “acquiesced in the federal court’s jurisdiction and waived objection to the removal. *See In re Moore*, 209 U.S. 490. 28 S.Ct. 706, 52 L.Ed. 904 (1908).” *Lanier v. American Brd. of Endodontics*, 843 F.2d 901, 904 (6<sup>th</sup> Cir. 1988). Thus the State could not proceed under Rule 45 I.R.C.P. had it wanted to, and had it proceeded under Rule 45, Fed.R.Civ.P., it would have waived its right to have this matter remanded, which it latter was successful in doing.

It is important to note that the documents the State obtained from Warpath, Inc. and Con-Way Freight are covered by discovery requests served upon Native Wholesale, but which the company has refused to respond.<sup>3</sup> Had Native Wholesale cooperated and responded to the State’s discovery, it would have produced the very same documents it seeks to have stricken by the Court here.

**B. Native Wholesale’s Objections To The Court Reviewing the Certified Copy of JoAnn Tornberg’s Deposition Are Without Merit**

Native Wholesale objects to the deposition of Ms. JoAnn Tornberg on hearsay grounds. The argument fails.

First, it is hornbook law that all relevant evidence is admissible, except as provided by the Idaho Rules of Evidence. Rule 402, I.R.E. Second, the Court determines admissibility of evidence. Rule 104(a). Third, where a matter is to be tried to the Court and not a jury, the Court “upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.” Rule 103(b).

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<sup>3</sup> A true and correct copy of the State’s discovery requests are attached to this memorandum for the convenience of the Court in reviewing.



Applying these rules here, it is not clear that the deposition of Ms. Tornberg is inadmissible. In fact, the opposite is true: the certified copy of the deposition is admissible.

Concerning Native Wholesale's claim that Ms. Tornberg's sworn statement is hearsay, the fact is that it is excepted from the hearsay rule pursuant to Rule 803(8), I.R.E. This rule exempts from the hearsay rule records of a public office or agency, unless circumstances indicate a lack of trustworthiness in the records. Such records must set forth matters that are regularly conducted and recorded pursuant to law and to which there was a duty to report. That is exactly what Ms. Tornberg's deposition is: As the Court can discern from the deposition, it is a record of a regularly recorded statement that was conducted and transcribed by a certified court reporter pursuant to law.<sup>4</sup> The trustworthiness and reliability of the deposition also cannot be refuted: As review of the deposition indicates, it was given under oath with an opportunity provided Ms. Tornberg to correct any mistakes or errors. Tornberg Deposition, p. 5, Ll. 10-13; p. 106 Ll. 4-13; p. 109 (Certificate of Reporter).

The simple fact is that the certified copy of Ms. Tornberg's deposition is the equivalent of an affidavit and easily satisfies the requirements for the admissibility of such a pleading: *See* Rule 56(e), I.R.C.P. (Affidavits shall be under oath, based upon personal knowledge and set forth facts admissible in evidence). There is thus no bar in this Court considering her concededly relevant, sworn statements, based upon her personal knowledge, concerning Native Wholesale's actions with respect to its sales activities directed to Idaho.

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<sup>4</sup> A certified copy of Ms. Tornberg's deposition is attached to the Second Affidavit of Beth Kittelmann as Exhibit G.

**C. Native Wholesale's Objections To Paragraphs 19 and 20 of Ms. Kittelmann's Second Affidavit Are Without Merit**

Native Wholesale objects to paragraphs 19 and 20 of Ms. Kittelmann's Second Affidavit. Paragraph 19 reports that the State advised the Nevada Foreign Trade Zone that the cigarettes of Native Wholesale which it was releasing for sale and shipment to Idaho were contraband and attached the State's August 14, 2008 letter that provided the Foreign Trade Zone the notice. Native Wholesale does not state how this statement lacks foundation or is hearsay and no grounds for such an assertion can be discerned. The statement is based upon personal knowledge, is under oath, and is relevant to this matter. It is admissible and may be considered by the Court.

Paragraph 20 reports Native Wholesale's response to the State's August 14, 2008 letter, which was to start to conceal from the Foreign Trade Zone the ultimate Idaho destination of its cigarette shipments by changing its shipping procedures with respect to cigarette sales to Idaho retailers. Ms. Kittelmann attaches copies of Native Wholesale's pre-and post-August 2008 invoices/bills of lading which confirm that which Ms. Kittelmann states: Native Wholesale's post-August 2008 invoices/bills of lading show Native Wholesaler as both the "buyer" of its own cigarettes and as the seller. Prior to August 2008, Native Wholesale's invoices/bills of lading would show Warpath, Inc. as the buyer. This, of course, would provide the Foreign Trade Zone with notice when cigarettes were going to Idaho and decline to release such cigarettes in such circumstances. After August 2008, by showing Native Wholesale as the buyer, the Foreign Trade Zone is unable to comply with the State's request that it not release Native Wholesale's non-compliant cigarettes for shipment and sale to Idaho retailers because the real purchaser and recipient of the cigarettes—Warpath, Inc.—is now covered up. Native Wholesale does not state

how Ms. Kittelmann's statement on this fact lacks foundation or is hearsay and no grounds for  
**PLAINTIFFS STATE OF IDAHO AND THE IDAHO STATE TAX COMMISSION'S REPLY MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE - 6**

such an assertion can be discerned. The statement is based upon personal knowledge, is under oath and is relevant to this matter. It is admissible and may be considered by the Court.

In summary, if there is “improper gamesmanship” in this matter, it is in what Native Wholesale seeks to do here. It has filed a motion to dismiss this case on personal jurisdictional grounds. The State has responded, in part, by showing through Native Wholesale’s own documents the level of control, focus and effort Native Wholesale has undertaken to serve the Idaho market. The documents undercut Native Wholesale’s personal jurisdiction motion. Thus, Native Wholesale seeks to have the documents stricken by contending that the State should have pursued only obtained the documents pursuant to procedures either barred by federal law, or which, at a minimum, would have forced the State to consent to the federal court exercising jurisdiction in this case, thus keeping this Court from hearing this case. This is gamesmanship.

Native Wholesale should not be allowed to have its cake and eat it too. It should not be allowed to improperly remove this matter to federal court and use the time the matter was before the federal court to make further and additional illegal cigarette sales and shipments to Idaho retailers. It is not persuasive in its argument that the State is somehow barred from utilizing its statutory authority to pursue investigating this matter during the pendency of Native Wholesale’s improper removal of this matter to federal court. And Native Wholesale should not be allowed to move to dismiss this case on personal jurisdiction grounds and suppress at the same time the Court’s review of Native Wholesale’s own sales documents—documents that Native Wholesale should have produced pursuant to discovery the State served upon it—and that undercut its personal jurisdiction motion.


**CONCLUSION**

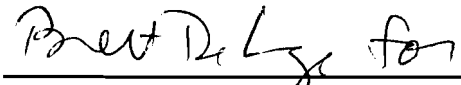
The State and the Tax Commission respectfully request that this Court deny Native Wholesale's motion to strike.

DATED this 1<sup>st</sup> day of July, 2009.

**LAWRENCE G. WASDEN  
IDAHO ATTORNEY GENERAL**

**IDAHO STATE TAX COMMISSION**

By   
**BRETT T. DELANGE**  
Deputy Attorney General  
Consumer Protection Division

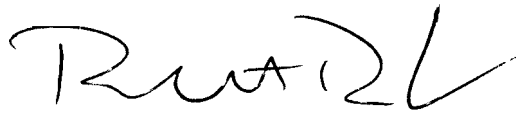
By  for  
**THEODORE V. SPANGLER, JR**  
Deputy Attorney General  
State Tax Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



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BRETT T. DELANGE  
Deputy Attorney General

Exhibit

**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. 08-CV-396-S-EJL

**MEMORANDUM DECISION AND  
ORDER**

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Currently pending before the Court are: (1) Defendant's Motion to Dismiss for Lack of Jurisdiction (Docket No. 4) and (2) Plaintiffs' Motion to Remand to State Court (Docket No. 5). This Order resolves Plaintiffs' Motion to Remand to State Court. Having fully reviewed the record, the Court finds oral arguments unnecessary and shall decide this matter on the written motions, briefs, and record without oral argument. Dist. Idaho Loc. Civ. R. 7.1(d)(2)(ii). Accordingly, the Court enters the following Order granting Plaintiffs' Motion to Remand to State Court. Therefore, it is not necessary to consider Defendant's Motion to Dismiss for Lack of Jurisdiction.

## I. BACKGROUND

Defendant, Native Wholesale Supply Company (“NWS”), is owned by Arthur Montour, a member of the Seneca Nation. (Montour Aff. ¶ 1, Docket No. 4-2.) NWS is located on the Seneca Nation of Indians Territory in New York and chartered by the Sac and Fox Tribe of Oklahoma. (Montour Aff. ¶ 2.) NWS buys cigarettes from Grand Rivers Enterprises Six Nations, Ltd. (“Grand Rivers”), which is located on a Canadian reservation and owned by tribe members. (Montour Aff. ¶ 3.) NWS then sells the cigarettes to Native American tribes or entities owned by members and located on tribal land. (Montour Aff. ¶ 5.) The only person or entity NWS sells to within the borders of Idaho is owned by the Coeur d’Alene Tribe and located on trust land. (NWS’s Mem. in Opp’n to Pls.’ Mot. to Remand 3, Docket No. 10.)

On August 14, 2008, the Idaho State Tax Commission and Idaho Attorney General, collectively Idaho, filed this Complaint against NWS and twenty John Does in the Idaho District Court of Ada County. (Compl., Docket No. 1-2.) It alleges NWS sold over 90 million cigarettes in Idaho that are not on the compliant cigarette directory, (Compl. ¶ 19), violating Idaho Code § 39-8403(3)(c)<sup>1</sup> (Compl. ¶ 34); an Ada County District Court injunction prohibiting Grand Rivers from selling cigarettes in Idaho, (Compl. ¶ 15); the Idaho Consumer Protection Act, (Compl. ¶ 39); and the Idaho Cigarette Tax Laws, I.C. § 63-2503(1), (Compl. ¶ 42).

On September 17, 2008, NWS removed this case from the Ada County District Court to this Court under 28 U.S.C. § 1441. (Notice of Removal, Docket No. 1.) Idaho moved to remand

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<sup>1</sup> It is illegal to sell, import, or cause to import for sale or distribution in Idaho any cigarette not listed on the compliant cigarette directory. Idaho Code § 39-8403(3)(b)-(c). Manufacturers making payments to Idaho from a settlement or into escrow for expected liabilities have their cigarettes listed in the directory. § 39-8403(2).



this case to state court for lack of subject matter jurisdiction. (Motion to Remand to State Court, Docket No. 5.) NWS opposes this motion arguing federal question jurisdiction exists under the Indian Commerce Clause.<sup>2</sup> (Docket No. 10.)

## II. DISCUSSION

### A. Standard of Review

The Ninth Circuit strictly construes the removal jurisdiction statutes against removal. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). Federal jurisdiction must be rejected if there is any doubt as to the right of removal. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

### B. Motion to Remand

Idaho's Motion to Remand to State Court argues this Court lacks subject matter jurisdiction and must therefore remand the case to state court under 28 U.S.C. § 1447(c). Subject matter jurisdiction exists if the case arises under the Constitution, laws, or treaties of the United States – a federal question. 28 U.S.C. § 1331. Generally, the federal question must be presented on the face of a “well-pleaded complaint” for federal courts to have jurisdiction. *Caterpillar Inc. v. Williams*, 428 U.S. 386, 396 (1987). An exception is when a federal cause of action completely preempts a state cause of action. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 436 U.S. 1, 24 (1993). Based on the discussion below, the Court must remand the case to state court under § 1447(c) because it lacks subject matter jurisdiction under (1) the well-pleaded complaint rule and (2) the complete preemption doctrine.

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<sup>2</sup> NWS has litigated and lost this removal issue with California and Oklahoma. *California v. Native Wholesale Supply Co.*, No. 08-1827 (E.D. Cal. Oct. 8, 2008); *Oklahoma v. Native Wholesale Supply*, No. 08-818, 2008 WL 4619808 (W.D. Okla. Oct. 16, 2008).

1. Well-Pleaded Complaint Rule

The well-pleaded complaint rule limits the claims that create federal jurisdiction. The rule requires a federal question to be presented on the face of the plaintiff's properly pleaded complaint – one plead without considering defenses. *Caterpillar*, 482 U.S. at 392. Because the rule does not allow for considering defenses as a basis for jurisdiction, a plaintiff that only relies on state law will avoid federal jurisdiction despite a defendant's federal defense. *Id.* at 393. This rule also applies to the defense of federal preemption. *Id.*

Here, Idaho only asserts violation of state law in the Complaint. NWS's only allegation for jurisdiction in this Court is federal preemption of state law. This is a federal defense to claims based on state law; this Court lacks jurisdiction under the well-pleaded complaint rule.

The Supreme Court's decision *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989) is based on the same material facts as this case. There, Oklahoma filed a complaint against the Chickasaw Tribe and the manager to collect unpaid state excise tax on the sales of cigarettes and bingo proceeds. *Id.* at 839. The face of Oklahoma's complaint only raised state tax questions. *Id.* at 840. The tribe removed the case to federal district court because the case was going to turn on the tribe's defense of sovereign immunity.<sup>3</sup> *Id.* at 839.

In *Graham*, the Supreme Court held that allegations of federal immunity from a state claim do not qualify for federal jurisdiction. *Id.* at 841. That is a defense, which is not considered under the well-pleaded complaint rule. Even if federal law preempted state law and provided the Chickasaw Tribe with immunity from the action, the claim still arose under state

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<sup>3</sup> A Native American tribe's sovereign immunity from state law is controlled by the extent federal law preempts state law. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973). Thus, the defenses of sovereign immunity and federal preemption are the same.

law and must be resolved there. *Id.* The Supreme Court held removal was improper and remanded the case. *Id.* at 842. This case is controlled by the *Graham* holding.

## 2. Complete Preemption

NWS argues removal is proper in this case under the complete preemption doctrine because “[t]he Indian Commerce Clause of the Constitution bestows on Congress the exclusive power to regulate Native American affairs and Supreme Court precedent supports the removal of this case.” (NWS’s Mem. in Opp’n to Pls.’ Mot. to Remand 4.) This Court disagrees because states are allowed to impose taxes on cigarette sales from Native Americans to nonmembers, showing federal law has not completely preempted state law.

The complete preemption doctrine provides federal jurisdiction to prevent the artful pleading under the well-pleaded complaint rule. *ARCO Envtl. Remediation, L.L.C. v. Dep’t of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000). Artful pleading is only listing state law as the basis of a claim even though federal law provides the appropriate remedy.

Complete preemption only applies “when a federal statute wholly displaces the state-law cause of action” by providing the only remedy available. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 & 11 (2003). Complete preemption applies in the limited circumstances where Congress chooses to regulate the entire field. *ARCO*, 213 F.3d at 1114. “Unlike complete preemption, preemption that stems from a conflict between federal and state law is a defense to a state law cause of action and, therefore, does not confer federal jurisdiction over the case.” *Id.*

NWS failed to present any statute or treaty expressing Congress's intent to regulate the entire field of Native American commerce or Native American commerce in cigarettes. (*See* NWS's Mem. in Opp'n to Pls.' Mot. to Remand.) Its reference to the Indian Commerce Clause is unpersuasive in establishing preemption because the clause only gives Congress the power to legislate. *Cotton Petroleum Corp. v. N.M.*, 490 U.S. 163, 192 (1989). Without an action by Congress, there is no preemption.

States are allowed to regulate and tax cigarette sales from tribe members to nonmembers. In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976), the Supreme Court recognized Montana's ability to make tribe members collect cigarette taxes on sales to nonmembers. The Supreme Court also upheld Washington's cigarette tax on sales by tribe members to nonmembers. *Wash. v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes."). Given a state's ability to regulate sales between tribe members and nonmembers, it cannot be said that state law has been completely preempted.

While the cases NWS cites establish federal preemption of some state laws regulating reservation activity, they fail to establish complete preemption. In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 173 (1973), the Supreme Court held Arizona could not tax a tribal member's income earned exclusively from the reservation she lived on because taken as a whole treaties, federal laws, and the historical context of the laws did not recognize the states ability to impose the tax. The case was first brought in Arizona state court and the Supreme Court reviewed the decision on a writ of certiorari from the Arizona courts under 28

U.S.C. § 1257. *Id.* at 167. In *Moe*, the Court extended *McClanahan* to prohibit Montana from taxing cigarette sales on a reservation between tribe members. 425 U.S. at 483. Federal

jurisdiction existed under 28 U.S.C. § 2281 as a constitutional challenge to state law, which has since been repealed. *Id.* at 465 n.1. These bases for federal jurisdiction do not apply here.

Because Congress has not displaced state law and the Supreme Court recognizes the authority of states to regulate cigarette sales between tribe members and nonmembers, the complete preemption doctrine does not apply. Therefore, this Court lacks subject matter jurisdiction and shall remand the case back to state court according to 28 U.S.C. § 1447(c).

### C. Attorney Fees

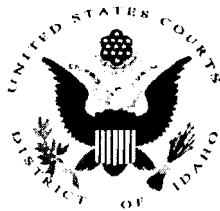
Plaintiffs' Motion to Remand requests costs and attorney fees incurred in connection with NWS's improper removal of this action. (Docket No. 5.) The statute says: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). If there is an objectively reasonable basis for seeking removal costs and fees should not be awarded. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Costs and fees are appropriate when established law clearly forecloses removal. *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1067 (2008).

Since 1914, defensive claims of federal law preempting state law on Native American matters have not created federal jurisdiction. *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914). The well-pleaded complaint rule does not provide subject matter jurisdiction. *Graham*, 489 U.S. at 842. Further, because states can impose taxes on cigarette sales between tribe members and

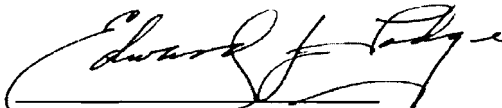
nonmembers, *Moe*, 425 U.S. at 483; *Confederated Tribes*, 447 U.S. at 155, federal law has not completely preempted state law. These Supreme Court cases clearly foreclosed NWS's removal. Therefore, Idaho will be awarded costs and attorney fees upon establishing the amount under Dist. Idaho Loc. Civ. R. 54.1 and 54.2, with opportunity for objection as to the amount.

### III. ORDER

In accordance with the foregoing, IT IS HEREBY ORDERED that Plaintiffs' Motion to Remand to State Court (Docket No. 5) is GRANTED. Pursuant to 28 U.S.C. § 1447(c), this case shall be remanded to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada. The clerk shall mail a certified copy of this Memorandum Decision and Order to the Ada County court clerk. Defendant shall be ordered to pay just costs any actual expenses, including attorney fees, caused by the Notice of Removal on the condition that Plaintiffs establish the amount pursuant to Dist. Idaho Loc. Civ. R. 54.1 and 54.2 by **April 21, 2009**. Defendant shall have until **May 12, 2009** to object to the amount of costs and expenses.



DATED: April 6, 2009

  
Honorable Edward J. Lodge  
U. S. District Judge

Exhibit

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,

Defendant.

Case No. CV OC 0815228

STATE OF IDAHO AND THE  
IDAHO STATE TAX  
COMMISSION'S FIRST  
DISCOVERY REQUESTS

The State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission (collectively "State of Idaho" or "Idaho"), pursuant to Rules 33(a), 34(a), and 36(a) of the Idaho Rules of Civil Procedure, propounds the following Interrogatories, Requests for Production, and Requests for Admissions ("Discovery Requests") to Defendant Native Wholesale Supply Company ("Native Wholesale").

I.

INSTRUCTIONS

- A. **Deadline to Respond.** Pursuant to Rules 33(a)(2), 34(b)(2), and 36(a) of the Idaho Rules of Civil Procedure, the information, **documents**, and responses requested herein must be

STATE OF IDAHO AND THE IDAHO STATE TAX COMMISSION'S FIRST  
DISCOVERY REQUESTS - 1

ORIGINAL



received by the State of Idaho on or before thirty (30) days after **Native Wholesale's** receipt of these Discovery Requests.

- B. **Reasonable Inquiry.** In answering these Discovery Requests, **Native Wholesale** shall provide all information and **documents** that are available to it or subject to its reasonable inquiry, including **documents** available to it, but in possession of its employees, representatives, or other agents.
- C. **Complete Answers Required.** If a specific Discovery Request has subparts, **Native Wholesale** shall answer each part separately and fully. If **Native Wholesale** cannot answer a Discovery Request fully, it shall answer to the extent possible, specify the reason for his inability to answer the remainder, and provide whatever information and knowledge it has regarding the unanswered portion.
- D. **Document Protection; Copies Authorized.** The State of Idaho requests that **you** permit counsel for the State to inspect and copy the documents and things requested herein on the 18<sup>th</sup> day of May, 2009, at the hour of 10:00 a.m., at the Office of the Attorney General, Consumer Protection Division, 954 W. Jefferson Street, Second Floor, Boise, Idaho, or at such other time and place as the parties may agree upon in writing. **Concerning documents** and other materials that **Native Wholesale** is requested to produce, as an alternative, accurate, legible, and complete copies may be attached to its answers and responses and served within the same 30-day period.
- E. **Electronic Copies Authorized.** **Concerning documents** and other materials that **Native Wholesale** is requested to produce, also as an alternative, accurate, legible, and complete copies may also be scanned onto a CD in Adobe Acrobat<sup>®</sup> PDF format and served within the same 30-day period.
- F. **Privilege Claims.** If **Native Wholesale** makes a claim of privilege to any question, it must state the basis for its claim and describe the claimed privileged item in reasonable and sufficient detail so that the State of Idaho can decide whether the claim of privilege is valid.
- G. **Supplementation.** If additional information becomes available to **Native Wholesale** after the State of Idaho receives **Native Wholesale's** complete and accurate responses to these Discovery Requests, **Native Wholesale** shall supplement its answers and responses.

## II.

### **DEFINITIONS**

Unless otherwise defined, specified, or indicated, the following definitions shall be applicable to these Discovery Requests:

- A. **“And”** and **“or”** are terms of inclusion and not of exclusion and shall be construed so as to bring within the scope of these Discovery Requests **any document** or information that might otherwise be construed to be outside its scope. For ease of readability, neither word will be bolded as follows.
- B. **“Any”** means one or more. For ease of readability, the word will not be bolded as follows.
- C. **“Cigarette”** means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one (1) individual "cigarette."
- D. **“Communication”** means any contact or act by which any information is transmitted or conveyed, **including** written contact by such means as e-mail, letters, invoices, sales receipts, bills, correspondence, memoranda, telegrams, telexes, telecopies, facsimile, or by any **document**, any oral contact such as face-to-face meetings or conversations, and telephone or any other electronically-transmitted communications or conversations.
- E. **“Complaint”** means the Verified Complaint filed by the State against **Native Wholesale** in this case on or about August 14, 2008.
- F. **“Concerning,” “relating to,” or “related to,”** any subject matter means any **documents, communication**, or any other tangible item that discusses, describes, refers to, reflects, contains, analyzes, studies, reports on, comments on, evidences, constitutes, sets forth, considers, recommends, or pertains to, in whole or in part in any manner to the subject.
- G. **“Document(s)”** means any written, recorded, or graphic matters, however produced or reproduced, pertaining in any way to the subject matter of these Discovery Requests, **including** any originals, copies, or drafts of any of the following: records, notes, summaries, organizational documents, financial statements, taxing authority filings, contracts, agreements, advertising, promotional materials, brochures, pamphlets, flyers, newsletters, magazines, drawings, plans, patent or copyright applications, scientific or other test results, peer reviews, scientific journal articles, invoices, purchase orders, checks, manuals, policies, rules, reports, forecasts, appraisals, memoranda of understanding, telephone logs, letters, telegrams, telexes, cables, tapes, transcripts,

audio/video recordings, emails, web pages, photographs, pictures, films, computer programs, or other graphics, symbols, and recorded or written materials of any nature whatsoever. Any document that contains a comment, notation, addition, insertion, or marking of any kind that is not part of another document is to be considered as a separate document.

- H.** “**Each**” means each and every. For ease of readability, the word will not be bolded as follows.
- I.** “**Grand River Enterprises**” means (i) Grand River Enterprises Six Nations Ltd., (referred to as “Grand River” in the Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, dated September 24, 2008, and filed in Case No. 1:08-cv-00396-EJL (U.S. District Court, District of Idaho)), and **any** of its principals, owners, officers, directors, shareholders, agents, employees, representatives, consultants, or attorneys, past and present; (ii) any other **persons** acting or purporting to act on their behalf or under their direction, authorization or control; and (iii) any predecessors, successors, subsidiaries, parents, assignees or affiliates of the foregoing.
- J.** “**In Idaho,**” **within Idaho,**” **to Idaho,**” and **“in the State of Idaho,”** mean within the exterior limits of the State of Idaho and includes all territory within these limits owned by or ceded to the United States of America, including Indian Country as defined by 18 U.S.C. § 1151.
- K.** Where asked to “**identify**” or describe a “**document,**” the description should include, but not be limited to, the following:
- a. The name, address, telephone number, occupation, and job title of the present custodian of the record, and, if applicable, the employer of the present custodian of the document;
  - b. The date the document was made or entered into and the name, address, telephone number, occupation, job title, and employer of each person whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence;
  - c. The name, address, telephone number, occupation, job title, and employer of the author(s) or person(s) who prepared the document;
  - d. The identity of the person(s) to whom the document was addressed, and who received each and every copy of the document;
  - e. A description of the nature and contents of the documents in such a manner that the custodian of the document would be able to locate it in response to a subpoena or request for production; and

- f. The identity and location of the file(s) where the original and each and every copy of the document is located.
- L. Where asked to “**identify**” a “person” who is a natural born individual, or where an answer refers to such a person, please state his or her name, last known address, occupation, last known business address, and last known personal and business telephone numbers.
- M. Where asked to “**identify**” a business entity or federal or state government agency, please give its correct name, and if it is a business entity, state whether it is a corporation, limited liability company, partnership, sole proprietorship, or unincorporated association and describe the nature of its business. If the business entity is a partnership or sole proprietorship, identify the person or persons who are its partners or owners and give the address and telephone number of the entity’s principal office.
- N. “**Including**” means including but not limited to.
- O. “**Lake Erie Tobacco Company**” means Lake Erie Tobacco Company, and any of its principals, owners, officers, directors, shareholders, agents, employees, representatives, consultants, or attorneys past or present; (ii) any other **persons** acting or purporting to act on their behalf or under their direction, authorization, or control; and (iii) any predecessors, successors, subsidiaries, parents, assignees or affiliates of the foregoing. Upon information and belief of the State, Lake Erie Tobacco Company is or has been located at 6564 or 6558 Route 417, Kill Buck, New York.
- P. “**NITCO**” means the Nevada International Trade Corporation, also known as Foreign Trade Zone #89 and as the Southern Nevada Trade Zone.
- Q. “**Person**” means any natural person, corporate entity, partnership, association, joint venture, government entity or trust, and any other business operation or legal entity.
- R. “**Seneca Territory Bonded Warehouse**” means the “bonded warehouse on the Seneca Cattaraugus Indian Territory” referred to in the Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, dated September 24, 2008, and filed in Case No. 1:08-cv-00396-EJL (U.S. District Court, District of Idaho).
- S. “**Warpath**” means Warpath, Inc., an Idaho corporation, currently located at North 165, Highway 95, Plummer, Idaho.
- T. “**Western New York FTZ**” means the Western New York Foreign Trade Zone in Lackawanna, New York, referred to in the Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, dated September 24, 2008, and filed in Case No. 1:08-cv-00396-EJL (U.S. District Court, District of Idaho).
- U. “**You,**” “**your,**” “**Native Wholesale Supply Company,**” “**Native Wholesale,**” and NWS means (i) Native Wholesale Supply Company, and any of its principals, owners,

officers, directors, shareholders, agents, employees, representatives, consultants, or attorneys past or present; (ii) any other **persons** acting or purporting to act on their behalf or under their direction, authorization, or control; and (iii) any predecessors, successors, subsidiaries, parents, assignees or affiliates of the foregoing.

### **III.**

#### **INTERROGATORIES**

**INTERROGATORY NO. 1.** Identify each business entity that **you** in whole or in part own, control, contract with, associate with, or that is a subsidiary, successor, or predecessor in interest of **Native Wholesale**.

**INTERROGATORY NO. 2.** Identify each **person** who may have information about the sale of Seneca or Opal brand cigarettes in Idaho and provide an explanation of what information each **person** may have.

**INTERROGATORY NO. 3.** If **you** deny in whole or in part any of the Requests for Admission in these Discovery Requests, identify each fact, each **person** who has knowledge of each fact, and each **document** evidencing each fact, which supports the basis for **your** denial.

**INTERROGATORY NO. 4.** Identify each **communication or document** between NWS and any **person** located in **Idaho relating to** the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation, distribution, or delivery of cigarettes.

### **IV.**

#### **REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1.** Produce any **documents relating to** shipments or releases to or from **NITCO**, the **Western New York FTZ**, or the **Seneca Territory Bonded Warehouse**, of cigarettes sold or distributed by NWS to any **person** located in **Idaho, including** (a) invoices; (b) orders; (c) bills of lading; and (d) **documents relating to** compliance with U.S. Customs requirements. Please note: " **any person** located in **Idaho** "

limits and describes the "cigarettes sold or distributed by NWS" referenced in the request; it is not meant to limit or describe to whom or where the "shipments or releases" referred to in the request are directed.

**REQUEST FOR PRODUCTION NO. 2.** Produce any **documents relating to communications** between NITCO, the **Western New York FTZ**, or the **Seneca Territory Bonded Warehouse** and NWS **relating to** the storage, handling, or shipment of cigarettes, including (a) contracts and (b) agreements.

**REQUEST FOR PRODUCTION NO. 3.** Produce any **communications** between NITCO and NWS **relating to** cigarettes shipped from NITCO or released by NITCO from January 1, 2004 to present.

**REQUEST FOR PRODUCTION NO. 4.** Produce any **communications** between NWS and any common or private carriers, **including** (a) Con-Way Freight, Inc., (b) APT Transportation, Inc., and (c) Leader Express **relating to** shipments or transportation **into or within Idaho** of cigarettes sold, imported, or distributed by NWS, **including** cigarettes shipped from or released by NITCO.

**REQUEST FOR PRODUCTION NO. 5.** Produce any contracts, agreements, invoices, bills, or **communications** between NWS and **Grand River Enterprises relating to** the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation, distribution, or delivery of cigarettes anywhere in the United States, where a purchaser or recipient of such cigarettes was **Warpath**.

**REQUEST FOR PRODUCTION NO. 6.** Produce any contracts, agreements, invoices, bills, or **communications** between NWS and **Grand River Enterprises relating to** the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation,

distribution, or delivery of cigarettes anywhere in the United States, and where a purchaser or recipient of those cigarettes was any person located **in Idaho** other than **Warpath**.

**REQUEST FOR PRODUCTION NO. 7.** Produce any contracts, agreements, or **communications** between **NWS** and **Warpath**, or any other **person** located **in Idaho** relating to the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation, distribution, or delivery of cigarettes.

**REQUEST FOR PRODUCTION NO. 8.** Produce any financial **documents, including** invoices, sales receipts, bank statements showing the transfer of funds, statements of accounts receivable and accounts payable, profit and loss statements, and other financial statements, **relating to** the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation, distribution, or delivery of cigarettes anywhere in the United States, where a purchaser or recipient of such cigarettes from **NWS** was **Warpath**, or any other **person** located **in Idaho**.

**REQUEST FOR PRODUCTION NO. 9.** Produce any **documents relating to your** sale of any cigarettes to any **person** located **in Idaho** that state the location of the sale, that the sale is on an F.O.B. Seneca Nation basis, and/or that title and risk of loss transfer to the purchaser at the time of sale on the Seneca Cattaraugus Indian Territory. (See Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, dated September 24, 2008, and filed in Case No. 1:08-cv-00396-EJL (U.S. District Court, District of Idaho)).

**REQUEST FOR PRODUCTION NO. 10.** Produce any **documents relating to NWS's** corporate organization, **including** charters, constitutions, articles of incorporation, applications and filings submitted to any governing authority, **including documents** showing its officers and directors from Jan. 1, 2000 to present.

**REQUEST FOR PRODUCTION NO. 11.** Produce any contracts, agreements, or **communications** between NWS and Gene Mack or any other customs broker, **relating to** the purchase, importation, sale, shipment, or release from Customs of cigarettes sold or distributed by NWS to **any person located in Idaho, including Warpath.**

**REQUEST FOR PRODUCTION NO. 12.** Produce any **documents relating to** the importation to, or shipment from, any **person** other than NITCO, the **Western New York FTZ**, or the **Seneca Territory Bonded Warehouse** of cigarettes sold or distributed by NWS to any **person** located in the state of **Idaho.**

**REQUEST FOR PRODUCTION NO. 13.** Produce any **documents relating to** travel **to or within Idaho** by any of NWS's principals, owners, officers, directors, shareholders, agents, employees, representatives, consultants, or attorneys.

**REQUEST FOR PRODUCTION NO. 14.** Produce any **documents** identified in your response to Interrogatory No. 4.

**REQUEST FOR PRODUCTION NO. 15.** Produce any contracts, agreements, invoices, bills, or **communications** between NWS and **Lake Erie Tobacco Company relating to** the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation, distribution, or delivery of cigarettes anywhere in the United States, where a purchaser or recipient of such cigarettes was **Warpath.**

**REQUEST FOR PRODUCTION NO. 16.** Produce any contracts, agreements, invoices, bills, or **communications** between NWS and **Lake Erie Tobacco Company relating to** the sale, offer for sale, purchase, ownership, possession, shipment, transportation, importation, distribution, or delivery of cigarettes anywhere in the United States, and where a purchaser or recipient of those cigarettes was any person located **in Idaho** other than **Warpath.**



V.

**REQUESTS FOR ADMISSION**

**REQUEST FOR ADMISSION NO. 1.** Please admit that **you** transported, imported or caused to be imported for sale and distribution **in Idaho** Seneca brand family cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 2.** Please admit that **you** transported, imported or caused to be imported for sale and distribution **in Idaho** Opal brand family cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 3.** Please admit that in 2004 **you** transported, imported or caused to be imported for sale and distribution **in Idaho** to Idaho retailers at least 24,650,000 Seneca and Opal brand cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 4.** Please admit that in 2005 **you** transported, imported or caused to be imported for sale and distribution **in Idaho** to Idaho retailers at least 21,406,000 Seneca and Opal brand cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 5.** Please admit that in 2006 **you** transported, imported or caused to be imported for sale and distribution **in Idaho** to Idaho retailers at least 22,830,000 Seneca and Opal brand cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 6.** Please admit that in 2007 **you** transported, imported or caused to be imported for sale and distribution **in Idaho** to Idaho retailers at least 24,442,000 Seneca and Opal brand cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 7.** Please admit that in 2008 **you** transported, imported or caused to be imported for sale and distribution **in Idaho** to Idaho retailers at least 14,152,000 Seneca and Opal brand cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 8.** Please admit that in January 2009 **you** transported, imported or caused to be imported for sale and distribution **in Idaho** to Idaho retailers at least 2,508,000 Seneca and Opal brand cigarettes manufactured by **Grand River**.

**REQUEST FOR ADMISSION NO. 9.** Please admit that (a) on June 5, 2008, the Idaho Attorney General's Office mailed a letter, certified mail, return receipt requested, to the president of **Native Wholesale**, Arthur Montour, Jr.; and (b) the letter was sent to **Native Wholesale's** mailing and street addresses.

**REQUEST FOR ADMISSION NO. 10.** Please admit that the document attached hereto as Exhibit A (Bates Numbers IDAG 150677 – IDAG 150678, inclusive) is a true and correct copy of the letter referenced in Request for Admission No. 9, and of the return receipts (IDAG 150810 – IDAG 150811), signed on June 9, and 10, 2008 for this letter.

**REQUEST FOR ADMISSION NO. 11.** Please admit that after June 10, 2008, **you** imported or caused to be imported for sale and distribution **in Idaho** at least 11,620,000 Seneca and Opal brand cigarettes manufactured by Grand River.

**REQUEST FOR ADMISSION NO. 12.** Please admit that **Grand River** is not listed on the Idaho Compliant Tobacco Manufacturer and Brand Family Directory as of the dates **you** imported or caused to be imported for sale and distribution **in Idaho**.

**REQUEST FOR ADMISSION NO. 13.** Please admit that the Seneca cigarette brand is not listed on the Idaho Compliant Tobacco Manufacturer and Brand Family Directory as of the dates **you** imported or caused it to be imported for sale and distribution **in Idaho**.

**REQUEST FOR ADMISSION NO. 14.** Please admit that the Opal cigarette brand is not listed on the Idaho Compliant Tobacco Manufacturer and Brand Family Directory as of the dates **you** imported or caused it to be imported for sale and distribution **in Idaho**.

**REQUEST FOR ADMISSION NO. 15.** Please admit that Arthur Montour is the President and sole owner of **Native Wholesale**.


**REQUEST FOR ADMISSION NO. 16.** Please admit that Arthur Montour as the President and sole owner of **Native Wholesale**, has knowledge of, directs, or controls **Native Wholesale's** importing and causing to be imported Seneca and Opal brand cigarettes for sale and distribution **in Idaho**.

REQUEST FOR ADMISSION NO. 17. Please admit that **Native Wholesale** does not now and had never possessed a cigarette permit, pursuant to Idaho Code Section 63-2503.

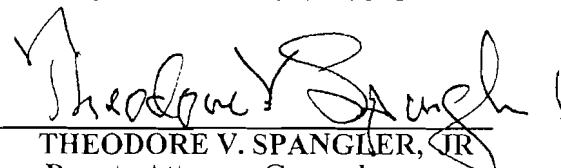
REQUEST FOR ADMISSION NO. 18. Please admit that **Native Wholesale** never applied for a cigarette permit, pursuant to Idaho Code Section 63-2503.

DATED this 9<sup>th</sup> day of April, 2009.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

By   
BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

IDAHO STATE TAX COMMISSION

By   
THEODORE V. SPANGLER, JR.  
Deputy Attorney General  
State Tax Commission



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

June 5, 2008

**VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED**

Arthur Montour, Jr.  
Native Wholesale Supply Company  
10955 Logan Road  
Perrysburg, NY 14129

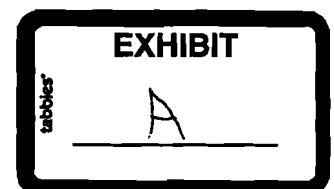
P.O. Box 214  
Gowanda, NY 14070

*Re: Notice of Apparent Liability Under Idaho law—Violations of Idaho's Tobacco  
Master Settlement Agreement Complementary Act (Complementary Act)*

Dear Mr. Montour:

It has come to our attention that Seneca brand cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. (Grand River Enterprises), imported by your company and held at the Nevada International Trade Corporation, Foreign Trade Zone #89, in Las Vegas, Nevada, have been sold and shipped at your company's direction from that location to at least one purchaser in the State of Idaho, namely War Path, North 165 Hwy 95, Plummer, ID 83851.

Idaho Code § 39-8403(3) of the Complementary Act makes it unlawful for any person to sell, offer for sale, possess, acquire, hold, own, import, or cause to import for sale or distribution in Idaho cigarettes of a tobacco product manufacturer or brand family not on the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho's Directory). Neither Seneca brand cigarettes nor Grand River Enterprises are listed on Idaho's Directory. Additionally, sale in Idaho of cigarettes manufactured by Grand River Enterprises, including Seneca, have been enjoined by order dated September 5, 2002, of the Fourth Judicial Court, in and for the County of Ada, State of Idaho, in the case entitled State of Idaho, by and through Alan G. Lance, Attorney General, v. Grand River Enterprises, Case No. CV OC 0205249M.



**U.S. Postal Service**  
**CERTIFIED MAIL RECEIPT**  
*(Domestic Mail Only; No Insurance Coverage Provided)*

**OFFICIAL USE**

7000 1530 0000 9416 9180

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
<b>Total Postage &amp; Fees</b>	<b>\$</b>

Postmark  
Here

6/5/02

**Sent To**

NWSC

Street, Apt. No.; or P.O. Box No.  
POB 214

City, State, ZIP+ 4

PS Form 3800, May 2000 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 P.O. Box 214  
 Gowanda NY 14070

**2. Article Number**

(Transfer from service label)

7000 1530 0000 9416 9180

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

**COMPLETE THIS SECTION ON DELIVERY**

**A. Signature**

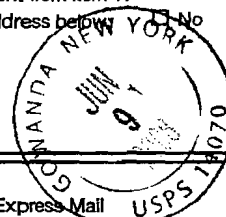
X [Signature]

- ☐ Agent  
☐ Addressee

**B. Received by (Printed Name)**

**C. Date of Delivery**

- D. Is delivery address different from item 1?** ☐ Yes  
 If YES, enter delivery address below ☐ No



**3. Service Type**

- ☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

**4. Restricted Delivery? (Extra Fee)**

- ☐ Yes

000504  
 IDAG150811

U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
 (Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

7000 1530 0000 9416 9173

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

6/5/04  
 Postmark  
 Here

Sent To	NWSC
Street, Apt. No.; or PO Box No.	10955 Logan Rd
City, State, ZIP+ 4	

PS Form 3800, May 2000

See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Arthur Montour Jr.  
 Native Wholesale Supply Co.  
 10955 Logan Road  
 Perrysburg NY 14129

**COMPLETE THIS SECTION ON DELIVERY**

- A. Received by (Please Print Clearly) Tricia Thomas B. Date of Delivery 6/10/08
- C. Signature x Tricia Thomas ☒ Agent ☐ Addressee
- D. Is delivery address different from item 1? ☐ Yes ☐ No  
 If YES, enter delivery address below:

3. Service Type

- ☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

2. Article Number (Copy from service label)

7000 1530 0000 9416 9173

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

IDAG 050506



[Track & Confirm](#)

[FAQs](#)

## Track & Confirm

### Search Results

Label/Receipt Number: 7000 1530 0000 9416 9180

Detailed Results:

- Delivered, June 09, 2008, 1:03 pm, GOWANDA, NY 14070
- Notice Left, June 09, 2008, 8:33 am, GOWANDA, NY 14070
- Arrival at Unit, June 09, 2008, 8:33 am, GOWANDA, NY 14070

[< Back](#)

[Return to USPS.com Home >](#)

### Track & Confirm

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No FEAR Act EEO Data

FOIA



Equal Opportunity  
Non-discrimination



Accessibility  
Non-discrimination

**LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO**

**BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

**APR 09 2009**

**J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY**

**Attorneys for the State of Idaho**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,**

**Plaintiffs,**

**vs.**

**NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,**

**Defendant.**

**Case No. CV OC 0815228**

**NOTICE OF SERVICE**

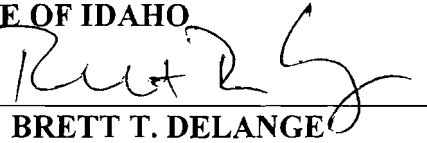
Plaintiffs The State of Idaho, by and through its Attorney General, Lawrence G. Wasden, and the Idaho State Tax Commission, (collectively "State of Idaho"), pursuant to Rules 33(a)(1), 34(d), and 36(c)(2) of the Idaho Rules of Civil Procedure, hereby give notice that the State of Idaho caused to be served the State of Idaho and the Idaho State Tax Commission's First Set of Discovery Requests, containing Interrogatories, Requests for Production, and Requests for Admissions, to Defendant Native Wholesale Supply Company.



DATED this 9<sup>th</sup> day of April, 2009.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

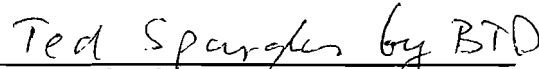
By



BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Division

IDAHO STATE TAX COMMISSION

By



THEODORE V. SPANGLER, JR  
Deputy Attorney General  
State Tax Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of April, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile



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BRETT T. DELANGE  
Deputy Attorney General

Session: Hansen070209  
Session Date: 2009/07/02  
Judge: Hansen, Timothy  
Reporter: Gosney, Vanessa

Division: DC  
Session Time: 13:44

Courtroom: CR503

Clerk(s):

Oatman, Diane

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002

Case number: CVOC0815228  
Plaintiff: Idaho, State of  
Plaintiff Attorney: Delange, Brett  
Defendant: Wholesale, Native  
Co-Defendant(s):  
Pers. Attorney: Diddle, Sam  
State Attorney:  
Public Defender:

2009/07/02

15:31:09 - Operator  
Recording:  
15:31:09 - New case  
Wholesale, Native  
15:31:33 - Judge: Hansen, Timothy  
Ct calls case; counsel identify themselves for the record  
15:31:53 - Judge: Hansen, Timothy  
Ct revws file  
15:33:28 - Judge: Hansen, Timothy  
Discussion re: materials filed in this case in lieu of Fed ct  
15:33:45 - Judge: Hansen, Timothy  
Ct addresses counsel re: motions  
15:36:12 - Plaintiff Attorney: Delange, Brett  
Argument re: preliminary injunction motion -- background info  
15:37:04 - Plaintiff Attorney: Delange, Brett  
Selling cigarettes wholesale for 4yrs -- not in compliance w/Idaho law  
15:38:55 - Plaintiff Attorney: Delange, Brett  
adv'd Native Wholesale -- cont'd to sell -- prelim injunction filed  
15:48:52 - Judge: Hansen, Timothy  
Ct inquires re: sale of cigarettes other than Warpath Inc  
15:49:34 - Pers. Attorney: Diddle, Sam  
Response -- cigarettes being sold on tribal land only  
15:53:14 - Pers. Attorney: Diddle, Sam  
Injunction issues  
16:10:19 - Pers. Attorney: Diddle, Sam

000510

Motion to dismiss  
16:12:35 - Pers. Attorney: Diddle, Sam  
Native sovereignty  
16:17:00 - Judge: Hansen, Timothy  
Ct inquires of counsel -- defense position  
16:17:27 - Pers. Attorney: Diddle, Sam  
Response  
16:18:20 - Plaintiff Attorney: Delange, Brett  
Rebuttal  
16:38:56 - Judge: Hansen, Timothy  
Ct inquires of counsel Warpath being corporation  
16:39:23 - Plaintiff Attorney: Delange, Brett  
Response -- no sovereign immunity  
16:40:33 - Judge: Hansen, Timothy  
Cont'd inquiry == responses interspersed  
16:44:08 - Pers. Attorney: Diddle, Sam  
Final argument  
16:55:10 - Judge: Hansen, Timothy  
NWS paying for shipping?  
16:55:29 - Pers. Attorney: Diddle, Sam  
Not clear  
16:55:34 - Judge: Hansen, Timothy  
Indian to Indian sales?  
16:55:51 - Pers. Attorney: Diddle, Sam  
No case cited that limit sovereign immunity  
16:57:28 - Judge: Hansen, Timothy  
Case authority w/proposition selling from one tribe member to another  
16:58:34 - Pers. Attorney: Diddle, Sam  
case involving gaming  
16:59:00 - Judge: Hansen, Timothy  
Ct will allow State to respond to prelim injunction  
16:59:16 - Plaintiff Attorney: Delange, Brett  
Response  
17:01:24 - Judge: Hansen, Timothy  
Briefing left open for one week -- next Friday, July 10 by 5:00 p.m.  
17:03:48 - Operator  
Stop recording:

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

FILED  
JUL 10 2009  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

THEODORE V. SPANGLER, JR., (ISB No. 1318)  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844

Attorneys for the Idaho State Tax Commission

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,

Defendant.

)  
)  
) Case No. CV OC 0815228  
)  
) PLAINTIFFS STATE OF IDAHO AND  
) THE IDAHO STATE TAX  
) COMMISSION'S SUPPLEMENTAL  
) MEMORANDUM IN OPPOSITION TO  
) DEFENDANT'S MOTION TO DISMISS  
)  
)  
)  
)  
)

ORIGINAL

## **INTRODUCTION**

At the hearing on the State of Idaho's and the Tax Commission's (collectively the State) motion for a preliminary injunction and Native Wholesale Supply Company's (Native Wholesale) motion to dismiss, the Court asked for supplemental briefing concerning what legal effect, if any, arises as the result of a sale originating on one reservation and ending on another, separate reservation. Applicable case law indicates that such sales do not preclude this Court from exercising personal or subject matter jurisdiction over Native Wholesale under the facts of this case.

## **BACKGROUND**

The record before the Court indicates the following. Native Wholesale is a corporation incorporated pursuant to the Sac and Fox Tribe of Oklahoma's corporate code and has its principal place of business on the Seneca Reservation, located in New York. Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, (Montour Affidavit), p. 2, ¶ 2. Native Wholesale sells cigarettes to Warpath, Inc. Second Affidavit of Beth Kittelmann (Kittelmann Affidavit), p. 4, ¶ 9. Native Wholesale does this by first sending the cigarettes to the Las Vegas Foreign Trade Zone (FTZ), where they are stored. When Warpath wants cigarettes, it orders them from Native Wholesale, which instructs the FTZ to release the ordered cigarettes to a trucking company, such as Con-Way Freight, with whom Native Wholesale has contracted and paid to deliver the cigarettes to Warpath. *Id.* Warpath is located in Plummer, Idaho, and the store is within the boundaries of the Coeur d'Alene Reservation. Affidavit of Samuel A. Diddle in Support of Motion to Dismiss for Lack of Personal Jurisdiction And/Or Subject Matter Jurisdiction, p. 2, ¶ 3, Exhibit B. Warpath is not a member of the Coeur d'Alene Tribe; it is an Idaho corporation. *Id.*, p. 2, ¶ 2, Exhibit A. Native Wholesale is not a

member of the Seneca Nation where its principal place of business is, nor is it a member of the Coeur d'Alene Tribe. It is incorporated pursuant to corporate charter of the Sac and Fox Tribe, located in Oklahoma. Montour Affidavit, p. 2, ¶ 2.

### **ARGUMENT**

#### **I. THE FACT THAT NATIVE WHOLESALE'S CIGARETTE SALES AND SHIPMENTS ARE TO A STORE LOCATED ON THE COEUR D'ALENE RESERVATION IN PLUMMER, IDAHO, DOES NOT PRECLUDE THIS COURT FROM EXERCISING PERSONAL JURISDICTION OVER NATIVE WHOLESALE**

Native Wholesale argues that because it sells and ships its cigarettes only to Warpath, Inc., an Idaho corporation located on the Coeur d'Alene Reservation in Idaho, this precludes this Court from exercising personal jurisdiction. Thus, with respect to its personal jurisdiction argument, Native Wholesale's Indian law focus is on the recipient and purchaser of its cigarettes, Warpath. Nothing in the Indian law, however, indicates that this Court is precluded from exercising personal jurisdiction over Native Wholesale as a result of its directed sales and shipments to Warpath.

Plummer, Idaho, where Warpath, Inc., is located, is within the geographic boundaries of the State of Idaho. *See* Art. XVII, Idaho Constitution (setting forth the boundaries of Idaho). That it is also located on the Coeur d'Alene Reservation does not change the fact that it is located within the boundaries of the State of Idaho. Being on a reservation does not mean you are not part of the state where the reservation is located. As the Ninth Circuit Court of Appeals has stated with respect to a matter involving the State of California: "The attributes of sovereignty possessed by [a] Tribe *do not negate the fact that [a] Reservation is a part of the State of California.*" Chemehuevi Indian Tribe v. California State Bd. of Equalization 800 F.2d 1446, 1450 (9th Cir. 1986) (emphasis added).

The fact is that being on an Indian reservation is not like being in a foreign country or even in a sister state. If you are on a reservation in Idaho you are in Idaho. *E.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188 (1989) ("In this case, . . . all of Cotton's leases are located entirely within the borders of the State of New Mexico and also within the borders of the Jicarilla Apache Reservation.") As the United States Supreme Court subsequently reiterated "[s]tate sovereignty does not end at a reservation's border . . . . Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (citations omitted).

These cases and others cited by the State in its previous briefing, *see e.g.* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); and Department of Health and Human Services v. Maybee, 965 A.2d 55 (Me. 2009), make clear that Idaho can regulate various matters related to activities originating on an Indian Reservation, including, for example, activities of a tribal member in instances where the State can point to off-reservation effects. *See e.g.*, Hicks, 533 U.S. at 362. When it comes to tobacco, equally without dispute is a State's authority to regulate on-reservation smoke shop sales to non-Indians **and** Indians who are not members of the resident tribe. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 150-62 (1980). There is nothing in these cases or Indian law in general which provides that the directed sales and shipments of tobacco products to a store located on a reservation within a State cannot be counted or evaluated for purposes of determining whether this Court may, consistent with Due Process, exercise personal jurisdiction over the entity selling and shipping these products into the State.

The cases Native Wholesale has cited to this Court to date in support of its "reservation-to-reservation" argument do not support its position. For example, in North Pacific Ins. v.



Switzler, 924 P.2d 839 (Or. Ct. App. 1996), an insurance company brought a declaratory judgment action that the driver of a truck involved in a single-car accident on the Warm Springs Reservation was not covered by a policy issued by the insurance company. The lower court ruled that the three victims of the accident were necessary parties and joined them. The victims objected to the joinder. As members and residents of the Warm Springs Tribes, they argued that the state court did not have personal jurisdiction over them. The lower court disagreed and the victims appealed. On appeal, the insurance company contended that Rule 4 A(2) of Oregon's Rules of Civil Procedure conferred personal jurisdiction. This rule grants personal jurisdiction over "natural person[s] domiciled within this state[.]" The Oregon Court of Appeals disagreed, interpreting its Rule 4 A(2) to mean that persons who reside on a reservation are not "domiciled" in Oregon and therefore applied Oregon's long-arm jurisdictional standards. 924 P.2d at 846.

The first prong of the Oregon court's analysis is undeniably at odds with other cases, including the later-decided Hicks, and should not be followed. *E.g.*, Acosta v. San Diego County, 126 Cal.App.2d 455, 465 (1954) ("Indians living on reservations in California are citizens and residents of this state"). To pose the obvious question: If tribal members residing on the Warm Springs Reservation are not domiciled in Oregon, what state are they domiciled in?

In any event, Switzler does not stand in the way of this Court exercising personal jurisdiction over Native Wholesale because it ultimately rested on a determination that insufficient off-reservation contacts existed between the insurer and the individuals claimed to be necessary and indispensable parties to support long-arm jurisdiction. Here, in stark contrast, Native Wholesale's contacts with Idaho are robust and establish personal jurisdiction even under the Oregon Court of Appeals' approach. Native Wholesale's conduct in Idaho—the directed sale and related shipments of 100 million cigarettes *into and through* this state to a store located in

Plummer—is far more than necessary to satisfy the Due Process Clause’s requirements for “minimum contacts” with the forum state. These facts do not fit into Switzler’s single-accident framework.

In State v. Flammond, 621 P.2d 471 (Mont. 1980), the court ruled that it had neither subject matter nor personal jurisdiction over a child support action against a father who is an enrolled member of the Blackfoot Tribe. The father married the mother in California and the couple separated in California. Later the father moved back to the Blackfoot Reservation. *Id.* at 472. Two points about this case bear mentioning. First, finding that it did not have subject matter jurisdiction, the court’s ruling on personal jurisdiction is *dicta*. Second, the facts surrounding this case are not close to that before this Court. Here, as discussed above and in the prior briefing, Native Wholesale has significant, sizable, and purposeful contacts with this forum by virtue of its selling, shipping and causing to be imported into Idaho millions of noncompliant cigarettes. Again, the facts of this case do not fit into Flammond’s child support framework.

Martinez v. Superior Court, 731 P.2d 1244 (Ariz. Ct. App. 1987), is like Flammond. A non-Indian wife filed for divorce in Arizona state court. The Indian husband objected on personal jurisdiction grounds. The court noted that the parties lived on the reservation of Colorado River Indian Tribes of whom the husband is a member, that the marriage occurred and fell apart on the reservation, that the children to the marriage were conceived on the reservation, and that the tribe had its own tribal code, divorce code, and tribal court to handle such matters. *Id.* at 1246. The court thus ruled that under such circumstance it could not exercise personal jurisdiction over the Indian father. Putting aside the merits of Martinez’s conclusion that it cannot exercise personal jurisdiction over a citizen of the forum state, it is nevertheless too far afield of the case before this court to be of help or instructive. The State is not suing Native

Wholesale for selling non-compliant cigarettes to Idaho citizens who have visited Native Wholesale's outlet in New York. It also is not suing Warpath for selling these non-compliant cigarettes on the Coeur d'Alene Reservation. Rather, it is suing Native Wholesale for selling, shipping, and causing to be imported into Idaho non-compliant cigarettes.

Native Wholesale's citations to In re Commitment of Beaulieu III, 737 N.W.2d 231 (Minn. App. 2007), R.C. Hedreen Company v. Crow Housing Authority, 521 F. Supp. 599 (D.Montana 1981); and Dixon v. Picopa Construction Company, 772 P.2d 1104 (Az. 1989) do not support its position. In Beaulieu, the court found that it **had** subject matter and personal jurisdiction over a member of the Red Lake Band of Chippewa Indians. 737 N.W.2d at 236-41.

In Dixon, the court ruled that it **had** personal jurisdiction over a corporation incorporated under the Salt River Pima-Maricopa Indian Community's business code. Relevant to this case, the court stated "[a]n Indian corporation . . . cannot leave the reservation, commit a tort, and then retreat back to the reservation to escape service of process. Justice demands and due process permits Arizona's long-arm rules to apply." 772 P.2d at 1112.

In Hedreen, the court, in ruling that the defendant housing authority, established pursuant to an ordinance of the Crow Tribe, can be considered a citizen of Montana for purposes of federal court diversity jurisdiction, stated that "[s]ince the Authority has voluntarily gone beyond reservation boundaries to transact the business and negotiate the contracts at issue here, suit could also have properly been brought in state court." 521 F.Supp. at 606 n.4. The federal district court went on to hold that where the tribally created entity's commercial transactions are "not confined to the reservation," the exercise of jurisdiction does not "infringe on the rights of

Indians to make their own laws and to be ruled by their own laws.” *Id.* (internal quotations and citations omitted).<sup>1</sup> These principles support the exercise of personal jurisdiction here.

## **II. THE FACT THAT NATIVE WHOLESALE’S CIGARETTE SALES ARE TO A STORE LOCATED ON THE COEUR D’ALENE RESERVATION IN PLUMMER, IDAHO, DOES NOT MEAN THAT THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION**

Native Wholesale argues that because it markets its cigarettes only to Warpath, Inc., this Court is divested of subject matter jurisdiction. As such, Native Wholesale asks the Court to predicate Indian law-based preemption simply on the fact that it sells and ships tobacco products from an out-of-state reservation to a store located on an Idaho reservation. Controlling federal common law requires a contrary conclusion.

It has long been settled that “Indians going beyond reservation boundaries have generally been subject to non-discriminatory state laws otherwise applicable to all citizens of the State.” Mescalero Apache, 411 U.S. at 148-49. Consequently, even were Native Wholesale deemed a member of the tribe on whose reservation its headquarters are located (and it is not), its actions in selling, shipping, and otherwise causing to be imported into Idaho non-compliant cigarettes, as well as at wholesale without the Tax Commission’s cigarette permit, would be subject to the relevant state tobacco legislation since no claim exists that these laws treat tribes or their members differently than similarly situated nonmembers. The Maine Supreme Court in Maybee so reasoned in rejecting a tribal member vendor's preemption challenge without regard to the specific location within Maine to which the cigarettes were shipped. 965 A.2d at 57 (“[a]ctivity

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<sup>1</sup> Equally unhelpful to Native Wholesale is its citation to Imo Industries, Inc. v. Kiekert AG, 155 F.3d 254 (3<sup>rd</sup> Cir. 1998). This non-Indian-law case does deal with personal jurisdiction but in a way that supports the State. Said the court: Under Calder v. Jones, 465 U.S. 783 (1984), personal jurisdiction can be upheld “if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal points of the tortious activity.” Kiekert, 155 F.3d at 265. That is exactly not only what the State here alleges but also what the relevant affidavits show.

of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states") (citing Hicks, 533 U.S. at 362-66). Native Wholesale, in short, enjoys no special status merely because its principal place of business exists on the Seneca Nation's New York reservation; its Indian law-relevant status is the same as it would be if it were headquartered in Boise (or Plummer, Idaho for that matter), where it enjoys no special exemption from state law because it admittedly is not a member of the Coeur d'Alene Tribe.<sup>2</sup>

The preemption inquiry therefore turns to whether the ultimate destination of the cigarettes—a city located on the Coeur d'Alene Reservation—makes a difference for Indian law purposes. Standing alone, it does not because Warpath, an Idaho corporation, is not a Coeur d'Alene tribal member, and the Supreme Court has "recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-

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<sup>2</sup> Colville established that only *members* of the reservation's *resident* tribe possess special Indian law-based preemption status. One of the questions in the case was whether Washington could tax cigarette purchases on the Colville Reservation by members of Indian tribes other than the Colville Tribe. The Supreme Court answered affirmatively. Concerning this trade between members of two different tribes, the Court held:

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

447 U.S. at 161.

*See also Duro v. Reina*, 495 U.S. 676, 686 (1990) ("The distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law. Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class"). Thus, if Washington can tax Indians of another tribe who make cigarette purchases on the Colville Reservation, it cannot be gainsaid but that Idaho can apply its laws to Native Wholesale, concededly a non-member of the Coeur d'Alene Tribe, and address its sales and shipments of non-compliant cigarettes to Warpath, Inc.

Indians located on reservation lands." County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 257-58 (1992). Tribal nonmembers, in other words, enjoy no special dispensation from state law with respect to transactions with other nonmembers, regardless of where those transactions occur. The Indian law preemption analysis accordingly should stop here.

Nevertheless, even were it assumed *arguendo* that Warpath, Inc., is a Coeur d'Alene member (it is not) and that the incidence of the involved regulation occurs on the Coeur d'Alene Reservation (it does not), the result would not change.<sup>3</sup> Application of the interest-balancing test articulated most definitively under White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), was addressed in the State's earlier brief opposing the motion to dismiss on subject matter jurisdiction grounds at pages 13-15, and that analysis will not be repeated. Nevertheless, in response to the Court's question about decisional authority dealing with specifically reservation-to-reservation sales, there appear to be no cases precisely on point. Other than Maybee discussed above, the most on-point decision appears to be Omaha Tribe v. Miller, 311 F. Supp. 2d 816 (S.D. Iowa 2004). There, the Omaha Tribe, a federally recognized Indian tribe that

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<sup>3</sup> The Supreme Court has made clear that, in determining whether Indian law preemption principles apply, it is important to identify not only who is being regulated but also "where" the legal bite of the regulation occurs. Wagnon, 546 U.S. at 102. Wagnon involved taxation of an off-reservation fuel distributor which marketed its product to a tribally-owned, on-reservation convenience store. The Court examined the Kansas fuel tax statute and concluded that the legal incidence of the challenged exaction occurred upon the fuel's "first receipt" by the distributor which took place off reservation. *Id.* at 102-05. Instantly, the regulatory incidence of Idaho Code §§ 39-8403(3)(c) and 63-2503 can, and should, be read to attach merely by the act of introducing cigarettes into Idaho for the purpose of distribution or sale. *See e.g.* Idaho Code § 39-8403(3)(c) (prohibiting, in part, causing non-compliant cigarettes to be imported into Idaho) and Idaho Code § 63-2503(1) (prohibiting, without a permit, a person from acting as a wholesaler of cigarettes, which Idaho Code Section 63-2502(a) defines, in part, as distributing cigarettes to retailers for resale). The triggering event is thus not the actual receipt of the non-compliant cigarettes by a purchaser but the requisite intent coupled with the act of introduction of the cigarettes into Idaho. Under these circumstances, the "where" of the transaction should be deemed to have occurred at the place of first entry into Idaho. It will be assumed for purposes of the analysis herein, however, that the incidence of Native Wholesale's statutory responsibility is triggered by virtue of its commercial relationship with Warpath, Inc.

manufactures cigarettes on its Nebraska reservation, sued the Iowa Attorney General, challenging the applicability of a state law requiring cigarette manufacturers either to join the tobacco Master Settlement Agreement or to deposit escrow payments based on cigarette sales to Iowa consumers. The Tribe contended that federal Indian law preempted application of Iowa's escrow law to its cigarette manufacturing enterprise. The federal district disagreed, finding that Iowa's law was not preempted by federal law supporting tribe self-determination and economic self-sufficiency, *id.* at 823-28; that federal statutes regulating tobacco did not preempt the Iowa law, *id.* at 822-23; and that the Iowa law did not run afoul of the Indian Commerce Clause, *id.* at 822, 825-26.

Here, Native Wholesale is neither a Seneca member nor an arm of the Seneca Nation.<sup>4</sup> Its position here is thus substantially weaker than that put forward by the Omaha Tribe. The conclusions reached by the Omaha Tribe court are correspondingly even more compelling: If the Omaha Tribe's cigarette sales to Iowans must comply with Iowa law, then *a fortiori* Native Wholesale's cigarette sales, shipments and importing of cigarettes into Idaho must comply with Idaho law.

Native Wholesale mentions one case in its last brief on subject matter jurisdiction—Dept. of Taxation and Finance v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)—in support of its argument that deserves comment. The case, far from supporting Native Wholesale, supports the State. In Attea, tobacco wholesalers doing business on Indian reservations in New York sued to enjoin enforcement of New York's' rather robust state tax regulation of cigarettes on

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<sup>4</sup> Indeed, according to the President of the Seneca Nation, Barry E. Snyder Sr. the Seneca Nation has no role whatsoever with Seneca brand cigarettes. "Snyder Vows Probe of Seneca Cigarettes," The Buffalo News, March 10, 2009, accessed at <http://www.buffalonews.com/cityregion/story/602680.html> (last viewed July 10, 2009).

reservations.<sup>5</sup> The wholesalers who sued were licensed by the Bureau of Indian Affairs of the United States Department of the Interior to sell cigarettes to reservation Indians. Their claim was that New York's cigarette tax regulations were preempted by the Indian Trader Statutes. In a unanimous decision the United States Supreme Court rejected this argument. The Court ruled that the reasoning of *Colville* and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) "requires rejection of the submission that [the Indian Trader Statutes, 25 U.S.C. § 261 et seq.], bars any and all state-imposed burdens on Indian traders." 512 U.S. at 74. Said the Court: "Just as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose." *Id.* The Court then proceeded to rule that New York's regulations were reasonable. *Id.* at 75-78.

In short, applicable Indian law does not preempt a state law that covers the sale of a cigarette from one reservation to another. Thus, there is no federal law bar undercutting this court's subject matter jurisdiction and it may proceed in addressing the claims the State has made against Native Wholesale here.

### **CONCLUSION**

Based on the foregoing argument, the State and the Tax Commission respectfully request that this Court deny Native Wholesale's motion to dismiss on personal and subject matter jurisdiction grounds and grant the State and Tax Commission's motion for a preliminary injunction.

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<sup>5</sup> New York's cigarette tax regulation imposes record keeping requirements and quantity limitations on cigarette wholesalers selling untaxed cigarettes to reservation Indians. Specifically, the regulations set quotas on the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal retailers, and New York's Department of Taxation must approve each such sale. Wholesalers must also ensure that buyers of the cigarettes hold a valid state tax exemption certificate and must keep records of their tax-exempt sales, make monthly reports to New York, and precollect taxes on nonexempt sales. 512 U.S. at 65-67.




DATED this 10<sup>th</sup> day of July, 2009.

**LAWRENCE G. WASDEN  
IDAHO ATTORNEY GENERAL**

**IDAHO STATE TAX COMMISSION**

By   
**BRETT T. DELANGE**  
Deputy Attorney General  
Consumer Protection Division

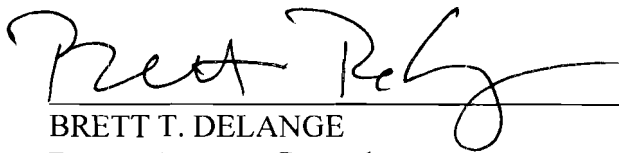
By   
**THEODORE V. SPANGLER, JR**  
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State Tax Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of July, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☐ U.S. Mail
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BRETT T. DELANGE  
Deputy Attorney General

JUL 18 2009

J. DAVID NAVARRO, Clerk  
By J. RANBALL  
DEPUTY

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S SUPPLEMENTAL  
MEMORANDUM**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Supplemental Memorandum in accordance with the Court's directive that the parties submit supplemental briefing on the issue of tribal sovereignty.

## I. LEGAL ARGUMENT

### A. Tribal Sovereignty

“Indian tribes retain attributes of sovereignty over both their members and their territory.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Tribal members retain their status “as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided . . .” *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 173 (1973). Accordingly, “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.” *Bracker*, 448 U.S. at 142. The Supreme Court has enunciated “two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members.” *Id.* “First, the exercise of such authority may be pre-empted by federal law.” *Id.*, citing *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685 (1965). “Second, [the assertion of state regulatory authority] may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.” *Id.*; see also *Williams v. Lee*, 358 U.S. 217, 220. (1959)

As an initial matter, “[w]hen on reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal-self government is at its strongest. *Bracker*, 448 U.S. at 144. Conversely, “where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation,” then “more difficult questions arise.” *Id.* These questions are answered by examining “the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have

developed from historical traditions of tribal independence. *Id.* at 144-145.

As to the first barrier to state regulatory authority, “[t]he tradition of Indian sovereignty must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.” *Bracker*, 448 U.S. at 143. “[T]his tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.” *Id.* The congressional declarations of policy in the Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.*, and in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 *et seq.*, are particularly significant:

It is hereby declared to be the policy of congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

25 U.S.C. §1451.

In addition, “the Congress declares its commitment to the maintenance of the federal government’s unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. §450(a)(b). Accordingly, in order to find that state regulation is preempted by operation of federal law in the field of federal Indian law, an express congressional statement to that effect is not required. *Bracker*, 448 U.S. at 143. The foregoing analysis requires a “particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry

designed to determine, whether in the specific context, the exercise of state authority would violate federal law.” *Id.* at 145.

The first step is to examine the federal statutes and regulations which govern the specific activity targeted for state regulation, and determine whether federal regulation is pervasive. The second step is to examine the state interest served by the statute sought to be imposed on reservation activity. Generalized interests are insufficient to support state regulation, when the tribe and its members have a strong interest in economic development and self-sufficiency via on-reservation economic transactions.

“The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded permissible limits.” *Bracker*, 448 U.S. at 151.

“Indian nations . . . long have been distinct political communities, having territorial boundaries, within which their authority is exclusive.” *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). The “presumption against state taxing authority applies to all Indian Country . . .” *Id.* at 126. Where the activity sought to be regulated, the court must “analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty” in considering the activity to be regulated. *Id.*

"In light of the unique sovereign status of Indian tribes located in [Idaho]," it is clear that the state "cannot tax cigarettes sold on an Indian reservation to tribal members for their own use, unless authorized to do so by Congress." *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881, 883 (6th Cir. 2007), citing *Wagon v. Prairie Band of Potawatomi Indians*, 546 U.S. 95

(2005). "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . , and in recognition of sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals are generally exempt from state taxation within their own territory." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 455 (1995) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). Where, as here, the tax scheme has some effect on an Indian tribe, "[t]he initial and frequently dispositive question . . . is who bears the legal incidence of [the] tax." *Wagnon*, 546 U.S. at 99 ("States are categorically barred from placing the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country") (citations omitted). Accordingly, "the who and where of the challenged tax have significant consequences." *Id.*

Here, the State of Idaho's argument that it may apply the Complementary Act to NWS, thereby requiring it to pay a fee to sell to tribal members on a reservation, proceeds from a false premise regarding the "who" and the "where" concerning the imposition of the fee. A cursory review of the State's brief makes this clear. For example, Plaintiffs repeatedly state that the transaction occurs "in Idaho," relying on this as dispositive of the issue of "where" the transaction occurred. These statements are contradicted by the evidence in the record, which shows that the sale by NWS occurs on an F.O.B. basis, i.e., on the Cattaraugus reservation in New York, to an Indian owned business located within the bounds of the enrolled members reservation. The evidentiary record also contradicts Plaintiffs' assertions concerning the "who," to the extent it characterizes the transaction as one between a non-member and a member of an Indian reservation in Idaho, since NWS is owned by a member of the Tribe which occupies the

reservation on which the sales are made, and is selling its products to an Indian owned business located within the reservation bounds of the enrolled member that owns the business.

Turning to the "where" of the transaction at issue, courts have held that where an entity situated on a reservation in one state ships goods to an entity situated in another state, the delivery does not occur in either state crossed by the agent transferring the goods. In *Winnebago Tribe of Nebraska v. Kline*, 150 P.3d 892 (Kan. 2007), the State of Kansas tried to impose its fuel distributor tax on a tribally owned entity which shipped fuel to tribal retailers located on a reservation within the state. The tribal entity was located on a reservation in the state of Nebraska and shipped its fuel to the tribal retailer located on a reservation in the state of Kansas. On these facts, the State asserted that delivery of the fuel took place in the state the moment the transport agent traveled into Kansas. The court, however, rejected this argument, holding that "receipt is to be given its ordinary meaning." *Id.* at 904. Therefore, "[t]here was no delivery or receipt when HCI's fuel truck crossed the Kansas state line. Delivery and receipt of the fuel occurred later at the tribal gas station," which was situated on the reservation. *Id.*

However, even if this Court accepts Plaintiffs' premise that the sale occurs on the reservation in Idaho with the tribally owned entity, Warpath, Inc., the State's arguments still fail. This is because Plaintiffs draw the wrong analogy from the case law by citing to cases which discuss sales by tribal members to non-members situated off the reservation. If the Court follows Plaintiffs' line of reasoning, then the Supreme Court's decision concerning sales by non-member wholesalers to members on the reservation are dispositive of the issues before the Court.

In *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980), an off-reservation enterprise owned by a non-member sold farm equipment to a tribe, wherein the sales



were solicited on the reservation, contracted on the reservation, and payment and delivery of the equipment took place on the reservation. *Id.* at 161. The State sought to tax these transactions by imposing a “privilege of doing business” in the state tax on the non-member seller. *Id.* The state pointed out that the seller was located off the reservation and was not a licensed Indian trader, and therefore these distinguishing factors permitted the state to impose its tax. *Id.* The Supreme Court rejected these arguments, expressly finding that that it was “irrelevant that the sale was made to a tribal enterprise rather than to the Tribe itself.” *Id.* The Court concluded that the preemptive force of the Indian trader statutes applied to a “nonresident person who sells” goods to Indians on a reservation and therefore, the tax was preempted. *Id.*

The Court later revisited this issue in *Dept. of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), and confirmed that the State may not impose a tax directly on sellers of goods that trade with Tribes or tribal enterprises situated on reservations by noting that “[t]he specific kind of state tax obligation that New York’s regulations are designed to enforce—which falls on non-Indian purchasers of goods that are merely retailed on reservation—stands on a markedly different footing from a tax imposed directly on Indian traders . . .” *Id.* at 73. The Court confirmed that a tax “directly imposed upon Indian traders for trading with Indians” is impermissible. *Id.* at 74, citing *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685, 691 (1965). Here, the tax sought to be imposed on NWS falls directly on it as a wholesaler, and is not designed to collect lawful state taxes which non-Indians owe off reservation. Idaho’s regulatory scheme which expressly exempts tribal enterprises like Warpath, Inc. from collecting any tax, the incidence of which would fall on non-Indians off the reservation, confirms that a seller like NWS bears the incidence of the fee imposed by Idaho’s Complementary Act. See

Idaho Admin. Code § 35.01.10, subdivision 014.01.b. (“Cigarette wholesalers may deliver cigarettes which do not have Idaho stamps fixed to Idaho Indian reservations when . . . the purchaser is a business enterprise wholly owned and operated by an enrolled member or members of an Idaho Indian tribe”). Such a tax is simply impermissible and may not be imposed on NWS absent congressional authorization. *Coeur D’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004).

In addition, the specific transaction sought to be taxed by the State of Idaho involves value created on the reservation since NWS is an Indian owned entity situated on the reservation, which purchases cigarettes made by another Indian owned entity situated on another reservation, which is subsequently sold to a member owned entity situated on a third reservation. In seeking to impose the incidence of the tax on NWS, the State of Idaho is seeking to burden a transaction, the value of which is created exclusively on reservation lands. *Milhelm*, 512 U.S. at 73 (noting that tax may not be directly imposed on “value generated on the reservation by activities involving the Tribes”), citing *Colville*, 447 U.S. at 156-57. Contrary to Plaintiffs’ assertions, this transaction here is not one between a member and a non-member, but rather, is one between a member of one tribe and a member of another tribe, with all activity occurring within the exclusive territorial and geographic jurisdiction of their respective nations. Therefore, any efforts by the State of Idaho to tax this transaction “infringes on the right of reservation Indians to make their own laws and be ruled by them.”

In addition, even if this Court concludes that (1) NWS is like any other non-member or non-Indian wholesaler selling to reservation Indians; and (2) the incidence of the tax imposed by the Complementary Act falls primarily on the non-Indian consumer off the reservation, the tax is

still invalid, as applied to NWS, because it imposes significant burdens on the transaction and is not “reasonably tailored to the collection of valid taxes from non-Indians.” *Milhelm*, 512 U.S. at 73.

Under the Supreme Court's decision in *Milhelm*, the instant statute is an invalid tax on NWS since: (1) it contains no provisions which carve out an exception for cigarettes sold by NWS to Warpath, Inc. which are destined for sales to tribal members; (2) it improperly imposes an unreasonable and significant burden on NWS's sales to Warpath, Inc., a tribal enterprise owned by tribal members; and (3) it improperly imposes an unreasonable and significant burden on Warpath Inc.'s concededly lawful receipt of cigarettes for resale to tribal members on the reservation.

In *Milhelm*, the Court expressly approved of New York's regulation of wholesalers' sales to reservation Indians because they remained “free to sell to Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price.” *Id.* at 75. In addition, the regulatory scheme adequately assured that “tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption.” *Id.* Here, the Complementary and Directory statute provisions both demand payment of the tax, regardless of whether they are sold to tax-immune Indians or Tribes, or to non-Indians residing off the reservation. Indeed, Idaho has conceded that it is seeking to regulate and tax direct sales to tribal members and Tribes when it states “the Complementary Act prohibits the sale of all non-compliant cigarettes, a defined term that incorporates both stamped and unstamped cigarettes.” (Plaintiffs' Brief at p. 6.) Indeed, the very case upon which Plaintiffs primarily rely for their argument that Indian law principles do not apply supports

NWS's argument that the state is precluded from burdening, in any way, whether characterized as a tax or not, sales to tribal members and Tribes, where that sale occurs exclusively on an Indian reservation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation").<sup>1</sup>

In conclusion, because Plaintiff has conceded that the Complementary and Directory statutes apply to sales to tax-exempt tribal members and tribes, it is undisputed that general prohibition of those sales, absent payment of the state tax, represents an unreasonable burden on NWS, the tribe, and its members, and therefore the statutes are not reasonably tailored to collect valid taxes from non-Indians.<sup>2</sup>

The states are precluded from directly taxing reservation lands or reservation Indians, *See County of Yakima*, 502 U.S. at 257; *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). The Supreme Court has invalidated state taxation on non-Indian contractors doing business with tribes on reservations. *See, e.g., Warren Trading Post*, 380 U.S. at 691 (invalidating a state gross proceeds tax imposed on reservation store owned by a non-Indian because the vast majority of the store's customers were Navajo Indians); *Bracker*, 448 U.S. 136 (1980) (invalidating a state motor carrier registration and fuel tax imposed on non-Indian

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<sup>1</sup> Plaintiff's have submitted no evidence that the Tribe in this case has ceded taxation jurisdiction to the State or that there is a federal statute that permits Idaho to apply the fees required by the Complementary Act to unstamped cigarettes which are destined for resale to tribal members situated on the reservation. In short, Plaintiffs' repeated characterization of Warpath, Inc. as an "Idaho business" subject to regulation by the Complementary and Directory statute is simply belied by both the facts and the law.

<sup>2</sup> The state also has other means at its disposal to address the concerns at issue in this litigation as to sales to non-Indians off the reservation, including entering into a government to government agreement which assures that the burden of its tax is imposed downstream of the tribe and its members, or seeking recourse in the appropriate tribal forum which does have civil regulatory jurisdiction over sales between tribally owned entities on the reservation.

company that hauled timber on reservation roads that had been cut from tribal lands); *Ramah Navajo*, 458 U.S. at 838 (striking down a State tax on the profits made by a non-Indian construction company that built a school on a reservation for the tribe, stating that “ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.”); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir.1989) (holding that federal law preempts the imposition of the California timber yield tax on the harvest by non-Indian purchasers of timber owned by the tribe, preempting taxes on “goods produced on the reservation.”); *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160 (1980) (finding state could not impose “transaction privilege tax” on the sale of farm equipment where the sale took place on the reservation, the contract was signed on the reservation and payment occurred thereon, notwithstanding that the seller did not reside on the reservation, was not licensed to trade with the Indians and the Court found it was irrelevant that the sale was made to a tribal enterprise rather than to the Tribe itself or that the seller did not maintain a permanent place of business on the reservation).

**B. The Doctrine of Tribal Sovereign Immunity Applies to Off-Reservation Commercial Activities of Tribes or Tribal Entities.**

The United States Supreme Court has clearly established that Indian tribes possess “the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The United States Supreme Court has stated that this common-law immunity “is a necessary corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g*, 476, U.S. 877, 890 (1986). Absent a clear and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any

state, federal, or arbitral tribunal.<sup>3</sup> *C & L Enter. v. Citizen Band Potawatomi Indian Tribe of Okla.* 532 U.S. 411, 418 (2001). Sovereign immunity presents a jurisdictional question and absent a waiver, presents an absolute bar to suits against tribes. *Kiowa Tribe v. Mfg. Tech, Inc.*, 523 U.S. 751, 754 (1998); *Chemehuevi Indian Tribe v. California State Bd. Of Equalization*, 757 F.2d 1047, 1052-53 (9<sup>th</sup> Cir. 1985).

The United States Supreme Court has made it clear that tribal sovereign immunity applies to tribal commercial activities involving non-Indians as well as traditional governmental functions. *Kiowa Tribe*, 523 U.S. at 754-55; see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (reaffirming tribal immunity from suit arising from state's attempt to impose taxation over cigarette sales). Furthermore, the Supreme Court has made clear that tribal sovereign immunity applies to commercial activities undertaken both on and off the reservation. *Kiowa Tribe*, 523 U.S. at 755 (“[t]hough respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.”). This includes actions by a state to enforce state law.

In *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165 (1977), the State of Washington obtained an order commanding an Indian tribe to provide information about tribal members' off-reservation fishing activities in an effort to enforce state fishing regulations. The tribe appealed, arguing that the order infringed on the tribe's sovereign immunity. The United

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<sup>3</sup> The doctrine of tribal sovereign immunity operates as a limitation on a court's subject matter jurisdiction. *E.g., Lawrence v. Barona Valley Ranch Resort and Casino* 153 Cal.App. 4<sup>th</sup> 1364, 1368 (2007). Indeed, the United States Supreme Court has specifically recognized the distinction between a state's power to regulate tribal conduct and the state's power to judicially enforce it: “There is a difference between the right to demand compliance with state laws and the means available to enforce them. *Kiowa Tribe*, 523 U.S. at 755 (emphasis added). While states may argue that this rule leaves them with a right without a remedy, the Supreme Court has disagreed, finding that states have adequate alternatives (such as entering into agreements with tribes or petitioning Congress). *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.* 498 U.S. 505, 514 (1991)

States Supreme Court agreed with the tribe, stating ‘the Tribe has attacked [the] order as an infringement on its sovereign immunity . . . . The attack is well founded. Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian Tribe.’ *Id.* at 172.

In addition, tribal entities organized under tribal law are considered to be part of the tribe and enjoy the tribe’s sovereign immunity from suit. *E.g., Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9<sup>th</sup> Cir. 2006); *Wright v. Colville Tribal Enterprise Corporation*, 147 P.3d 1275, 1279 (Wash. 2006); *see Barker v. Menominee Nation Casino* 897 Supp. 389 (E.D. Wis. 1995) (“commission” that was issued a corporate charter under tribal law was an arm of the tribe and thus suit against it was a suit against the tribe itself). Sovereign immunity from suit does not “turn on the particular form in which the Tribe chooses to conduct its business.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 n.13 (1973). *See also Redding Rancheria v. Superior Court*, 898 Cal.App.4<sup>th</sup> 384, 387 (2001) (tribal entity treated as tribe for immunity purposes).

**C. Even if NWS Were Not Considered a Tribal Entity, It Is Not Subject to Idaho’s Regulatory Power.**

In 1832, the United States Supreme Court held that the regulatory power of the state, even when it involved regulation of a non-Indian, did not extend into Indian country. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). The court stated that Georgia’s legislative power stopped at the reservation boundary and could not cross it to regulate the behavior of the people within the Cherokee Nation. One hundred fifty years later, the United States Supreme Court in *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 173 (1973), reiterated this point. The Court discussed “reservation Indians” and by this reference meant to include Indians who were within Indian country whether or not they were members of the reservation tribe. When the Court “concluded that the state power to tax did not

extend to on-reservation activities of 'reservation Indians,' [it] clearly meant Indians who were members of a tribe and also those Indians who were members of other tribes." Scott Taylor "*The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*," 91 *Marquette Law Review*, 917, 958 (Summer 2008).

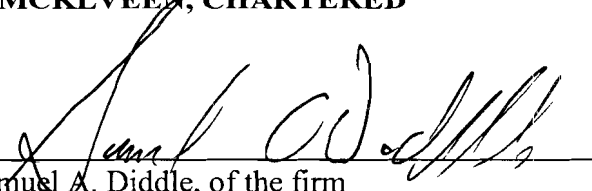
Indeed, the Idaho legislature has recognized that Indians who live on a different tribe's reservation are still "Indians" and enjoy immunity from taxation. Idaho Code §63-3026A(4)(b)(iv) refers to "income earned within the original exterior boundaries of any federally created Indian reservation by an enrolled Indian in a federally recognized Indian tribe on a federally recognized Indian reservation . . . ." Thus, it is apparent the Idaho legislature does not discriminate between enrolled members of Idaho tribes and other Indians, as long as that Indian is an enrolled member of an Indian tribe in the United States.

## II. CONCLUSION

NWS requests the Court to dismiss Plaintiff's Complaint for lack of jurisdiction.

DATED this 10<sup>th</sup> day of July, 2009

**EBERLE, BERLIN, KADING, TURNBOW,  
& MCKLVEEN, CHARTERED**

By   
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 10<sup>th</sup> day of July, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

**AUG 26 2009**

**J. DAVID NAVARRO, Clerk**  
By **P. BOURNE**  
DEPUTY

**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

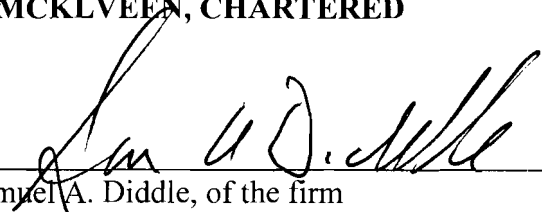
**FILING OF SUPPLEMENTAL  
AUTHORITY**

Defendant, NATIVE WHOLESALE SUPPLY COMPANY hereby files this Supplemental Authority in support of its motion to dismiss. Attached hereto as Exhibit "A" is a tentative ruling from a Superior Court of California addressing virtually identical issues between the California Attorney General and Native Wholesale Supply Company. This ruling shall become final within thirty (30) days of oral argument which was August 24, 2009.

DATED this 20 day of August, 2009.

**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

By

  
\_\_\_\_\_  
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 26 day of August, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden Attorney General State of Idaho Brett T. DeLange Deputy Attorney General Consumer Protection Division Office of the Attorney General Len B. Jordan Building 650 W. State Street, Lower Level PO Box 83702 Boise, Idaho 83702-0010	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax (208) 334-4151 <input type="checkbox"/> Electronic Court Transmission
Theodore V. Spangler, Jr. Deputy Attorney General Office of the Attorney General State Tax Commission PO BOX 36 Boise, Idaho 83720-0410	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax (208) 334-7844 <input type="checkbox"/> Electronic Court Transmission

  
\_\_\_\_\_  
Samuel A. Diddle

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. \_\_\_\_\_  
FILED  
A.M. \_\_\_\_\_ P.M. 12:00

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

SEP 15 2009

J. DAVID N. WATSON, Clerk  
By \_\_\_\_\_  
DEPUTY

Case No. CV QC 0815228

ORDER

On August 14, 2008, Plaintiff State of Idaho by and through the Attorney General and the Idaho State Tax Commission filed its Verified Complaint seeking injunctive and other relief as to Defendant Native Wholesale Supply Company. The case was subsequently removed to U.S. District Court. However, in a Memorandum Decision and Order dated April 6, 2009, the case was remanded to this Court. On April 9, 2009, Plaintiff filed Plaintiffs State of Idaho and the Idaho State Tax Commission's Motion for Preliminary Injunction, Plaintiffs State of Idaho and the Idaho State Tax Commission's Memorandum in Support of Motion for Preliminary Injunction, Affidavit of Don Anderson, and Affidavit of Beth A. Kittelmann. On May 6, 2009, Defendant filed Defendant's Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction, Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction, and Defendant's Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction, Subject Matter Jurisdiction, and for Failure to State a Claim. On June 23, 2009, Plaintiff filed Plaintiffs State of Idaho and the Idaho State Tax Commission's Memorandum in Opposition to Defendant's Motion to Dismiss on Subject Matter Jurisdiction Grounds, Plaintiffs State of Idaho and the Idaho State Tax Commission's Memorandum

1 in Opposition to Defendant's Motion to Dismiss on Personal Jurisdiction Grounds, and Second  
2 Affidavit of Beth A. Kittelmann. On June 25, 2009, Defendant's Memorandum in Response to  
3 Plaintiff's Motion for Preliminary Injunction was filed. On June 30, 2009, Defendant filed its Motion  
4 to Strike the Second Affidavit of Beth Kittelmann, Defendant's Reply to Plaintiff's Memorandum in  
5 Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Defendant's  
6 Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss on Personal  
7 Jurisdiction Grounds, and Affidavit of Samuel A. Diddle in Support of its Motion to Dismiss for Lack  
8 of Personal Jurisdiction and/or Subject Matter Jurisdiction. On that same day, Plaintiff filed Plaintiffs  
9 State of Idaho and the Idaho State Tax Commission's Reply Memorandum in Support of Motion for  
10 Preliminary Injunction. On July 1, 2009, Plaintiffs State of Idaho and the Idaho State Tax  
Commission's Reply Memorandum in Opposition to Motion to Strike was filed.

11 Hearing on these motions was held on July 2, 2009. During the arguments of counsel, an  
12 additional issue was raised that the Court felt required further briefing. The Court allowed the parties  
13 additional time to do so. On July 10, 2009, Plaintiff filed Plaintiffs State of Idaho and the Idaho State  
14 Tax Commission's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss and  
15 Defendant filed Defendant's Supplemental Memorandum. At that point, the Court deemed that matter  
fully submitted and took the various motions under advisement.

16 Subsequently, on August 26, 2009, Defendant submitted its Filing of Supplemental Authority.  
17 In this document, Defendant noted there was a decision from the Superior Court of California ruling  
18 on issues virtually identical to those before this Court. However, Defendant did not indicate what  
19 those issues were or to which of the motions before this Court they applied. Furthermore, a copy of  
20 that decision was not attached to the Filing of Supplemental Authority nor did Defendant provide any  
21 citation and, therefore, the Court has been unable to review it. The Court feels it would benefit from  
such a review.

22 Therefore, the Court will reopen the matter and allow both sides the opportunity to address this  
23 further. Defendant will have two weeks from the date of this order to submit any additional material  
24 related to this newly cited authority. Plaintiff will then have two weeks to submit any material in  
25 response and Defendant will thereafter have one week to reply. At that point, the Court will decide  
26

1 whether to set the matter for further argument or again deem the matter fully submitted and rule on  
2 the various motions without further hearing.

3 IT IS SO ORDERED.

4 Dated this 15th day of September, 2009.

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6 TIMOTHY HANSEN  
7 District Judge  
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# CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, on this 15<sup>th</sup> day of September, 2009, one copy of the ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

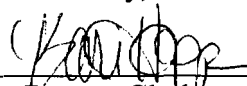
LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO  
BRETT T. DeLANGE  
DEPUTY ATTORNEY GENERAL  
CONSUMER PROTECTION DIVISION  
OFFICE OF THE ATTORNEY GENERAL  
954 W. JEFFERSON ST., SECOND FLOOR  
P.O. BOX 83720  
BOISE, IDAHO 83702-0010

THEODORE V. SPANGLER, JR.,  
DEPUTY ATTORNEY GENERAL  
IDAHO STATE TAX COMMISSION  
800 PARK BOULEVARD  
P.O. BOX 36  
BOISE, IDAHO 83722-0150

SAMUEL A. DIDDLE  
EBERLE, BERLIN, KADING, TURNBOW &  
McKLVEEN, CHARTERED  
1111 WEST JEFFERSON ST., SUITE 530  
P.O. BOX 1368  
BOISE, IDAHO 83701

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

By

  
Deputy Clerk



**Samuel A. Diddle, ISB #4967**  
**EBERLE, BERLIN, KADING, TURNBOW**  
**& McKLVEEN, CHARTERED**

1111 West Jefferson Street, Suite 530

P. O. Box 1368

Boise, ID 83701

Telephone: (208) 344-8535

Facsimile: (208) 344-8542

SEP 29 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**MEMORANDUM REGARDING**  
**SUPPLEMENTAL AUTHORITY**

By order dated September 15, 2009, the Court requested an explanation of a decision rendered in similar litigation in California state court involving the State of California and Native Wholesale Supply Company ("NWS"). This Memorandum is in response to the Court's request.

NWS was sued by the California Attorney General, seeking to impose obligations under "Tobacco Master Settlement Act" or "Complementary Act" legislation upon NWS in connection with sales of cigarettes by NWS, to either an enrolled member of a tribe or an entity entirely

owned by enrolled members of a tribe on a FOB Seneca Nation basis with receipt of the cigarettes on tribal land.

The California Attorney General asserted various claims against NWS including violation of the California Tobacco Directory Law. A copy of the complaint is attached to the Affidavit of Samuel A. Diddle as Exhibit "B." In that action, NWS moved to quash service of the summons and complaint on grounds that the California court lacked jurisdiction over NWS. In response, the State of California argued that it did have jurisdiction, advancing arguments substantially similar to those raised by the State of Idaho in this litigation. A copy of the State of California's response memorandum is attached to the Affidavit of Samuel A. Diddle as Exhibit "C" and a copy of NWS' reply memorandum is attached as Exhibit "D."

On May 1, 2009, the California trial court issued an order requesting briefing on the following four issues:

1. Whether activities occurring only on tribal lands constitute minimum contacts for purposes of acquiring personal jurisdiction over a non-resident entity;
2. Whether the transportation of goods through the State of California is sufficient to establish minimum contacts, even though the ultimate destination of the goods is a tribal reservation;
3. Whether the fact that the tribal entity that purchases goods from a non-resident entity redistributes those goods to California residents is sufficient to support a finding of minimum contacts for the purpose of acquiring jurisdiction over that non-resident entity; and
4. At what point does personal jurisdiction attach? Upon shipment of goods through the State of California? Upon delivery of goods to a tribal entity located on tribal lands? Upon redistribution of those goods to California residents?

See Exhibit “D” to the Affidavit of Samuel A. Diddle at p. 1 (NWS Reply Brief stating issues the court requested the parties to address). The California court’s inquiry was substantially similar to that of this court’s .

On August 24, 2004, the California court decided and held that it did not have jurisdiction over NWS due to its sale of cigarettes to a tribal entity or tribe. On September 25, 2009, the California court finalized that ruling. The final decision is attached to the Affidavit of Samuel A. Diddle as Exhibit “A.” In that decision the court first stated:

Authorities in other jurisdictions applying a minimum contacts analysis involving Indian reservations have concluded that activities taking place solely on Indian land do not constitute contacts with the forum state. *Flammond v. Flammond*, (Mont. 1980) 621 P.2d 471. The Court held that Montana did not have personal jurisdiction to enforce a California Court’s order to pay child support against a father who is an enrolled member of the Blackfeet Tribe and lived on the Reservation. The Montana court reasoned that there were no off-reservation acts in Montana sufficient to vest that state’s courts with personal jurisdiction over the father.

See Order of California Superior Court in *People Ex Rel. Edmund G. Brown Jr. v. Native Wholesale* attached to Affidavit of Samuel A. Diddle Exhibit “D.” The California Superior Court then applied the reasoning of the cited authority to the facts before it and held:

However to the extent that the Plaintiff asserts that NWS’ sales to Big Sandy constitute minimum contacts within a state simply because Big Sandy is physically located in this state, the Court rejects that proposition. The court is persuaded by the cases discussed above that on-reservation conduct is insufficient to establish minimum contacts with the forum state absent off-reservation activities within the forum state.

*Id.*

Next the California court addressed the State’s claims that because NWS’ purchaser, Big Sandy, sold cigarettes to non-Indians, State interests outside the reservation were implicated

allowing regulation of the activity of tribal members on tribal land. The Court also rejected this argument stating:

Plaintiff has not cited and this court is not aware of any authority permitting states to regulate interstate commerce between Indian tribes or tribal entities. Such activities are more properly subject to congressional regulations, which have plenary power to regulate Indian commercial activities. *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4<sup>th</sup> 239, 249.

As the Court finds that the state cannot regulate the interstate commerce between NWS and Big Sandy, it rejects the defendant's contention that NWS' sales to Big Sandy constitute minimum contacts with this state.

*Id.*

The California Court also noted that enforcement of the statutes upon NWS was also impermissible because states are categorically barred from placing a tax's legal incidence on a tribe or tribal member.

States are categorically barred from placing a tax's legal incidence on a tribe or on tribal members for sales made inside Indian country. *Wagnon v. Prarie Band Potawatomi nation* (2005) 546 U.S. 95, 106 (upholding sales tax imposed on in-state distributors, manufacturers or importers of fuel sold to Indian tribe for sale on tribal land because the legal incidence of the tax did not fall on the tribe).

Next, the Court addressed the State's argument that because NWS placed its goods in the stream of commerce with the alleged expectation that they would be purchased by consumers in California, the California courts had jurisdiction over NWS. The court rejected this argument and held:

Plaintiff's contention that this evidence shows that defendant directed the sales to Big Sandy and downstream to other California entities is not persuasive. The only inference the Court draws from the evidence of Big Sandy's downstream sales is that Big Sandy acted as a seller and distributor of cigarettes to other entities in California, Indian and non-Indian, as a result of the tribe's own

independent economic decision. There is no evidence supporting an inference that NWS exercised any control over Big Sandy's downstream sales. The record establishes only that NWS filled orders placed by Big Sandy and shipped those orders to Big Sandy or other entities designated by Big Sandy. NWS did not place its own name on the cigarettes as the Massachusetts distributor did in *Uberti*, supra, 892 P.2d at 1360-1361. Unlike the manufacturer in *Duple*, supra, who made special modifications to its coach for the Hawaii market, NWS did not modify the cigarettes it sold to Big Sandy in any way so as to serve the California market. Rather, the evidence that each package of cigarettes sold by NWS was stamped "for reservation sales only" indicates NWS intended to sell its cigarettes only to Indian reservations and not the wider California market.

While it may have been foreseeable to NWS that cigarettes sold to Big Sandy would be resold to others, foreseeability alone is insufficient to support specific jurisdiction. As *You Sow v. Crawford Laboratories, Inc.* (1996) 50 Cal.App.4<sup>th</sup> 1859, 1868-1869 (multi-million dollar sales to GSA's California depot over a period of six years insufficient to apply stream of commerce theory where seller had no control over final destination of its products). "Foreseeability that a product will enter California without having some control over its ultimate destination does not satisfy the due process clause of the United States Constitution."

*Id.*

Virtually identical facts and legal principles exist in the instant case and this Court should reject the State's "Stream of Commerce" theory for establishing personal jurisdiction over NWS. There is no evidence that NWS exercised any control over Warpath's sales. NWS simply sold cigarettes to Warpath in packages stamped "for reservation sales only."

The California trial court also found that it would not be fair and reasonable to exercise jurisdiction over NWS under the circumstances and that shipment of the cigarettes by truck over California roadways was not sufficient to constitute minimum contacts. *Id.*

In its September 25, 2009, Order, the California Court addressed the state's argument that the sales by NWS were the same as a sale by NWS to WalMart. The Court rejected this argument.

At the hearing, plaintiff contended that the law recognizes no distinction between shipments of cigarettes to Big Sandy and shipments of cigarettes to a WalMart store located in the State of California. The argument is fundamentally flawed as it ignores the fact that Big Sandy is a sovereign Indian tribe. Activities involving a sovereign physically located in California. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Nevada v. Hicks (2001) 533 U.S. 353, 361-362. Absent Congressional authorization or a tribe's or consent, the courts do not have subject matter jurisdiction over a tribe. Lawrence v. Barona Valley Ranch Resort & Casino (2007) 153 Cal.App.4<sup>th</sup> 1364, 1368-1370.

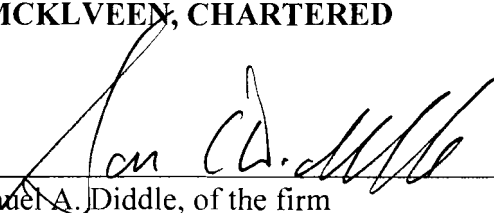
Plaintiff is correct that this is not a lawsuit against an Indian tribe. However, plaintiff too narrowly construes the subject matter of this action as merely sales by an out-of-state corporation to a California entity, as though the sales were a unilateral act of NWS. No sales would be made by NWS unless Big Sandy purchased the cigarettes. Thus, the activity which plaintiff contends is unlawful is not just in the act of NWS in shipping cigarettes into California; it is a business transaction between an out-of-state corporation and an Indian entity located in California. This kind of business transaction is not only subject to limitations on a state's power to regulate interstate commerce, it is also subject to limitations imposed by the Indian Commerce clause. None of the authorities relied upon by plaintiff discuss minimum contacts where the activity involves interstate commerce and/or the Indian Commerce clause.

NWS and the State of Idaho have presented substantially similar arguments as those advanced and considered by the California Superior Court. The California Superior Court's decision provides sound persuasive authority and NWS respectfully requests that this Court consider the California decision and dismiss the Plaintiffs' Complaint for lack of jurisdiction.

DATED this 29 day of September, 2009.

**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

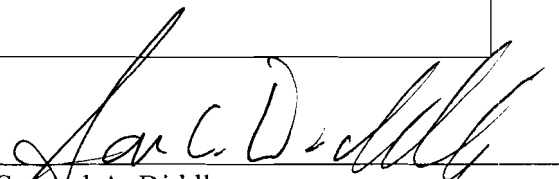
By

  
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

### CERTIFICATE OF SERVICE

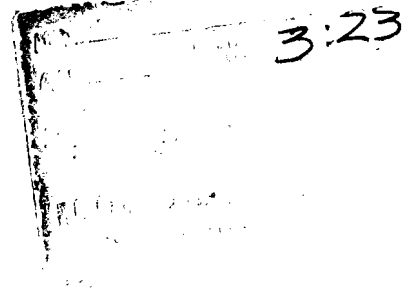
I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 20 day of September, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden Attorney General State of Idaho Brett T. DeLange Deputy Attorney General Consumer Protection Division Office of the Attorney General Len B. Jordan Building 650 W. State Street, Lower Level PO Box 83702 Boise, Idaho 83702-0010	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax (208) 334-4151 <input type="checkbox"/> Electronic Court Transmission
Theodore V. Spangler, Jr. Deputy Attorney General Office of the Attorney General State Tax Commission PO BOX 36 Boise, Idaho 83720-0410	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax (208) 334-7844 <input type="checkbox"/> Electronic Court Transmission

  
Samuel A. Diddle



Samuel A. Diddle, ISB #4967  
EBERLE, BERLIN, KADING, TURNBOW  
& McKLVEEN, CHARTERED  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542



Attorneys for Defendant Native Wholesale Supply Company

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**AFFIDAVIT OF SAMUEL A.  
DIDDLE IN SUPPORT OF  
MEMORANDUM REGARDING  
SUPPLEMENTAL AUTHORITY**

STATE OF IDAHO     )  
                              : SS.  
County of Ada         )

**SAMUEL A. DIDDLE** being first duly sworn do hereby state the following under oath:

1. I am one of the attorneys representing Defendant Native Wholesale Supply Company in this matter and as such have personal knowledge of the matters stated herein.

**ORIGINAL**

2. Attached hereto as Exhibit "A" is a true and accurate copy of the California Superior Court's final ruling in *People of the State of California, ex rel P. Edmond G. Brown, Attorney General v. Native Wholesale Supply Company*, Case No. 34-2008-00014593.

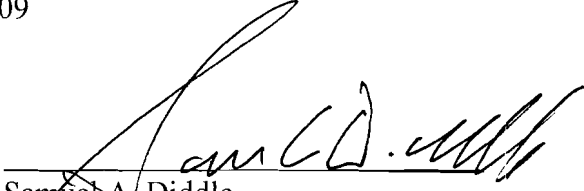
3. Attached hereto as Exhibit "B" is a true and accurate copy of a complaint filed in California Superior Court - the State of California against NWS.

4. Attached hereto as Exhibit "C" is a true and accurate copy of the State of California's supplemental opposition to NWS' motion to quash service of the summons.

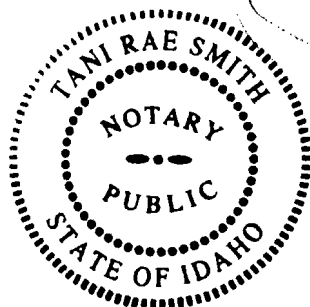
5. Attached hereto as Exhibit "D" is a true and accurate copy of the NWS' applied California supplemental opposition to its motion to quash the service of the summons.

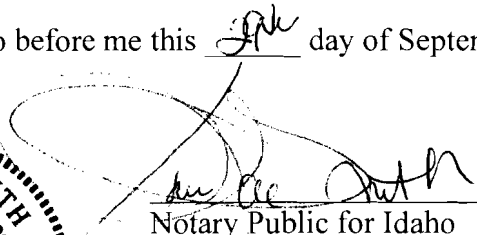
Further, your affiant sayeth not.

DATED this 29 day of September, 2009

  
\_\_\_\_\_  
Samuel A. Diddle

SUBSCRIBED AND SWORN to before me this 29 day of September, 2009.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing: Meridian, Idaho  
My Commission Expires: 3/10/11

**CERTIFICATE OF SERVICE**

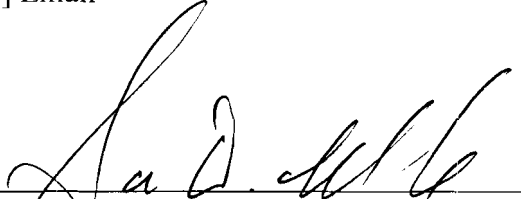
I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 29 day of September 2009, as indicated below and addressed as follows:

Lawrence G. Wasden  
Attorney General  
State of Idaho  
Brett T. DeLange  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
Len B. Jordan Building  
650 W. State Street, Lower Level  
PO Box 83702  
Boise, Idaho 83702-0010  
(208) 334-2424

☒ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-4151  
☐ Email

Theodore V. Spangler, Jr.  
Deputy Attorney General  
Office of the Attorney General  
State Tax Commission  
PO BOX 36  
Boise, Idaho 83720-0410  
(208) 334-7530

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Fax (208) 334-7844  
☐ Email

  
\_\_\_\_\_  
Samuel A. Diddle

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SACRAMENTO  
GORDON D SCHABER COURTHOUSE  
MINUTE ORDER

Date: 09/25/2009

Time: 02:25:14 PM

Dept: 54

Judicial Officer Presiding: Judge Shelleyanne W L Chang  
Clerk: E. Higginbotham

Bailiff/Court Attendant: None  
ERM: None

Case Init. Date: 06/30/2008

Case No: 34-2008-00014593-CU-CL-GDS Case Title: People of the State of California ex real Edmund  
G Brown Jr Attorney General vs. Native Wholesale Supply

Case Category: Civil - Unlimited

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Event Type: Motion to Quash Service of Summons - Civil Law and Motion

Causal Document & Date Filed:

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**Appearances:**

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**Nature of Proceeding: Motion to Quash Service of Summons (Taken Under Submission  
8/24/2009)**

**TENTATIVE RULING**

Defendant Native Wholesale Supply ("NWS")'s motion to quash is granted for the reasons set forth below.

The complaint alleges that NWS has violated Rev. & Tax. Code section 30165.1 by selling to California businesses brands of cigarettes that are not listed in the Attorney General's directory of manufacturers who have complied with this state's financial responsibility laws. Such sales also allegedly violate Health and Safety Code section 14950 (establishing ignition-propensity standards), 15 USC section 375 et. seq (shipping cigarettes in interstate commerce to persons or entities in California that are not licensed as cigarette distributors by the California Board of Equalization) and Bus. & Prof. Code section 17200 (unfair competition).

NWS contends that California does not have personal jurisdiction over it because it has no minimum contacts with the State of California, as it is an out-of-state corporation that sells and ships cigarettes only to Native American tribes and Native American-owned entities located on the land of recognized Indian tribes.

The following facts are undisputed. NWS is chartered by Sac and Fox Nation, a federally recognized sovereign Native American nation, and is wholly owned by Arthur Montour, a member of the Seneca Nation of Indians, a federally recognized sovereign Native American nation. Its business operations are maintained on the Seneca Cattaraugus Indian Territory which is physically situated in New York. NWS does not have an office, personnel, mailing address, bank accounts, sales agents, telephone, real estate or vehicles in California. NWS is an out-of-state corporation that has no office or other presence in this State. Montour decl.

The record before the Court establishes that the only entity in this state to which NWS has directly sold

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Date: 09/25/2009

MINUTE ORDER

Dept: 54



Page: 1

Calendar No.:

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cigarettes is Big Sandy Rancheria, a recognized Indian tribe. Big Sandy, in turn, has sold cigarettes purchased from NWS to other Indian and non-Indian persons and entities in California. Some of NWS sales to Big Sandy were shipped directly to other entities in California.

Plaintiff concedes that the State has no general jurisdiction over defendant. Plaintiff contends, however, that this court has specific jurisdiction over NWS. Specific jurisdiction arises when a defendant has purposefully availed itself of the privilege of conducting activities in California; the claim arises out of defendant's California-related activity; and the exercise of jurisdiction would be fair and reasonable. *F. Hoffman-LaRoche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 796. Plaintiff asserts that NWS has purposefully availed itself of the privilege of conducting activities in California by: 1) its direct sales to Big Sandy Rancheria, and 2) its indirect sales to entities and persons "downstream" from Big Sandy. The Court examines each of these contentions in turn.

Whether minimum contacts are established by sales to Big Sandy

Plaintiff has cited no authorities, and the Court is aware of none, holding that sales by an out-of-state corporation to an Indian tribe on a reservation located in this state constitute minimum contacts with this state that will support personal jurisdiction over the out-of-state corporation. Indeed, the Court has found no California authorities applying a minimum contacts analysis where any activities on an Indian reservation were involved.

Authorities in other jurisdictions applying a minimum contacts analysis involving Indian reservations have concluded that activities taking place solely on Indian lands do not constitute contacts with the forum state. In *Flammond v. Flammond* (Mont. 1980) 621 P.2d 471, the Court held that Montana did not have personal jurisdiction to enforce a California court's order to pay child support against a father who was an enrolled member of the Blackfeet Tribe and lived on the tribe's reservation. The Montana court reasoned that there were no off-reservation acts in Montana sufficient to vest that state's courts with personal jurisdiction over the father. The marriage had taken place in California, and the mother had returned to California after separating from the father. The father's domicile on the reservation was not an in-state contact that would support jurisdiction.

In *Martinez v. Superior Court* (Ariz.App.1987) 731 P.2d 1244, 1246, a dissolution action by a non-Indian wife against a reservation Indian husband, the court applied the general rule that state courts do not have jurisdiction over an Indian living on an Indian reservation absent sufficient minimum contacts by the Indian within the state away from the reservation. As the marital domicile was on the reservation, the children were conceived on the reservation and the separation occurred on the reservation, the court concluded that it had no jurisdiction. On similar facts, the court in *Byzewski v. Byzewski* (N.D. 1988) 429 N.W.2d 393, 397 came to the same conclusion.

Out-of-state authorities are not, of course, controlling. Further, these cases involve domestic relationships, while this case involves commercial activity. However, to the extent that plaintiff asserts that NWS' sales to Big Sandy constitute minimum contacts with this state simply because Big Sandy is physically located in this state, the Court rejects that proposition. The Court is persuaded by the cases discussed above that on-reservation conduct is insufficient to establish minimum contacts with a forum state absent off-reservation activities within the forum state.

Plaintiff further contends that NWS' sales to Big Sandy constitute minimum contacts with this state because state law applies to reservations located in this state. The issue of the application of state law to Indian reservations is not as simple as the broad generalities relied upon by plaintiff, e.g. "reservations are part of the state within which they lie and state laws, civil and criminal, have same force within reservation as elsewhere except for restricted application to Indian wards. *Surplus Trading Co. v. Cook* (1930) 281 U.S. 647, 650-651. That statement was, in any event, dicta as the only issue decided by the court was state taxation of non-Indian owned private property located on a federal military base. As the U.S. Supreme Court later observed, "That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government; on the one hand, and those of the State, on the other.'" *Nevada v. Hicks* (2001) 533 U.S. 353, 362, quoting *Washington v. Confederated Tribes of Colville Reservation* (1980) 447 U.S. 134, 156.

As the court in *San Manuel Indian Bingo and Casino v. NLRB* (D.C.Cir. 2007) 475 F.3d 1306, 1312, concluded, "[a]n examination of Supreme Court cases shows tribal sovereignty to be at its strongest when explicitly established by a treaty ... or when tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe[.] [citations omitted] Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest."

In sum, state's interests are generally highest when the individual Indian or Indian tribe engages in off-reservation conduct within the forum state. E.g., *Nevada v. Hicks*, supra (state officers executing process related to the violation, off reservation, of state laws); *Organized Village of Kake v. Egan* (1962) 369 U.S. 60 (state regulation of fish traps operated in non-reservation waters); *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145 (state tax on gross receipts of ski resort operated on land outside the tribe's reservation).

The state's interests are weakest where the conduct of the individual Indian or Indian tribe is on-reservation conduct relating to tribal sovereignty. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 144.

Plaintiff contends that, where state interests outside the reservation are implicated, a state may regulate the activities of even tribe members on tribal land, such as sales of cigarettes on reservation land by tribal entities to nonmembers from off the reservation. *Nevada v. Hicks*, supra, 533 U.S. at 362, citing *Washington v. Federated Tribes of Colville Reservation* (1980) 447 U.S. 134, 151. Plaintiff urges the Court to find that NWS' sales to Big Sandy implicate unidentified state interests outside the reservation because Big Sandy, in turn, sells those cigarettes to California entities and consumers off the reservation.

The Court initially notes that the power of the state to regulate on-reservation conduct implicating off-reservation state interests cannot be assumed in every situation. In *Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal.App.4th 1364, 1368-1370, the court held it had no subject matter jurisdiction to apply state tort laws against Indian casino operated on reservation. In *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 84, the court held that tribal immunity extends to a tribe's for-profit business entities when the entity is operating on behalf of the tribe. In *Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1340, the court concluded that Public Law 280 does not confer on California the power to enforce its full panoply of general civil regulatory jurisdiction over Native American Indian tribes, and therefore the California Workers Compensation Appeals Board had no jurisdiction over injuries sustained by an employee of an Indian casino operating on reservation land.

Recognition by the courts that states have the power to impose taxes on the on-reservation sales of cigarettes to non-Indians is not authority that the states may regulate on-reservation sales in general, or NWS' sales to Big Sandy in particular. As the U.S. Supreme Court explained in *Federated Tribes*, supra, state taxing schemes on cigarettes and other goods sold to non-Indians have been upheld because the legal incidence of the tax fell on the non-Indian purchaser. The effect was simply to neutralize the competitive advantage gained by the tribes over other retailers by exploiting the willingness of non-Indian purchasers to "flout" their legal obligation to pay the taxes. 447 U.S. at 151. States are categorically barred from placing a tax's legal incidence on a tribe or on tribal members for sales made inside Indian country. *Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 106 (upholding sales tax imposed on in-state distributors, manufacturers or importers of fuel sold to Indian tribe for sale on tribal land because the legal incidence of the tax did not fall on the tribe).

Here, the legal incidence of the statutes at issue in this case would not fall on non-Indian consumers. These statutes do not impose a tax that can be passed along to the non-Indian consumer. Rev. & Tax. Code section 30165.1 imposes an absolute ban on the sales of certain brands of cigarettes that are not listed on the Attorney General's directory: "No person shall sell, offer, or possess for sale in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer not included in the directory." Rev. & Tax. Code section 30165.1(e)(2). The legal incidence of this ban, if applied here, would fall directly on Big Sandy as an importer as well as NWS as a seller of unregistered cigarettes.

Of even more significance, NWS' sales to Big Sandy constitute not only commerce between Indian-owned entities but also interstate commerce. The authorities upholding the power of a state to impose taxes on sales of goods have concerned only sales within that state. Plaintiff has not cited, and this Court is not aware of any authority permitting a state to regulate interstate commerce between Indian tribes or tribal entities. Such activities are more properly subject to Congressional regulation, which has plenary power to regulate Indian commercial activities. *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 249.

As the Court finds that the state cannot regulate the interstate commerce between NWS and Big Sandy, it rejects defendant's contention that NWS' sales to Big Sandy constitute minimum contacts with this state.

#### Stream of commerce theory

Plaintiff alternatively contends that purposeful availment can be shown by placing goods in the stream of commerce with the expectation that they will be purchased by consumers in the forum state. *Bridgestone Corp. v. Superior Court* (2002) 99 Cal.App.4th 767, 777. Plaintiff contends that courts regularly find jurisdiction over a foreign defendant where the defendant's product arrived through the stream of commerce in the forum state via an equally foreign middleman. *A. Uberti & C. v. Leonardo* (Ariz. 1995) 892 P.2d 1354, 1362-1363 (jurisdiction over Italian manufacturer whose guns were sold in Arizona through third party middleman in Massachusetts); *Duple Motor Bodies, Ltd. v. Hollingsworth* (9th Cir. 1969) 417 F.2d 231 (sale of product by foreign manufacturer via middleman in England to buyers in Hawaii); *Barone v. Rich Bros. Interstate Display Fireworks Co.* (9th Cir. 1994) 25 F.3d 610, 613-614 (Japanese corporation subject to suit in Nebraska where middleman was South Dakota distributor).

Defendant contends that shipments of cigarettes purchased by Big Sandy to other entities is at the direction of Big Sandy, and that Big Sandy's re-sales of cigarettes to other entities are the unilateral activities of a third party.

Plaintiff bears the initial burden to demonstrate facts that support the exercise of jurisdiction. *Bridgestone Corp. v. Superior Court*, supra, 99 Cal.App.4th 767. Plaintiff has produced the following evidence in opposition to this motion: declarations of Cook, Allison, Carlson and Diaz regarding their purchases of Opal and Seneca cigarettes from Big Sandy Rancheria, Huber Enterprises Smoke Shop, Native Made Tobacco Shop, and Black Hawk Tobacco Shop; the declaration of Gable regarding various records demonstrating the amount of sales and shipments made by defendant to Big Sandy and to Big Sandy consignees. The Court notes that the Gable declaration includes as an exhibit the declaration of Vincent Buehler, a law clerk who prepared spread sheets based on sales and shipping documents. Notably, Buehler's declaration states at para. 8 that the only purchaser identified on any of the 234 shipments made by defendant from December 2003 to mid-2008 was Big Sandy Rancheria, although several shipments designated Huber Enterprises and Native Buy as consignees. Gable's declaration states that her review of all records available regarding defendant's sales and shipments to entities in California show sales only to Big Sandy, with 40 shipments to Huber Enterprises, 27 shipments to Native Made Tobacco, 6 shipments to Native Buy and one shipment to Black Hawk Tobacco.

Plaintiff's contention that this evidence shows that defendant directed the sales to Big Sandy and downstream to other California entities is not persuasive. The only inference the Court draws from the evidence of Big Sandy's downstream sales is that Big Sandy acted as a seller and distributor of cigarettes to other entities in California, Indian and non-Indian, as a result of the tribe's own independent economic decision. There is no evidence supporting an inference that NWS exercised any control over Big Sandy's downstream sales. The record establishes only that NWS filled orders placed by Big Sandy and shipped those orders to Big Sandy or other entities designated by Big Sandy. NWS did not place its own name on the cigarettes as the Massachusetts distributor did in *Uberti*, supra, 892 P.2d at 1360-1361. Unlike the manufacturer in *Duple*, supra, who made special modifications to its coach for the Hawaii market, NWS did not modify the cigarettes it sold to Big Sandy in any way so as to serve the California market. Rather, the evidence that each package of cigarettes sold by NWS was stamped "for reservation sales only" indicates NWS intended to sell its cigarettes only to Indian reservations and not the wider California market.

While it may have been foreseeable to NWS that cigarettes sold to Big Sandy would be resold to others, foreseeability alone is insufficient to support specific jurisdiction. As *You Sow v. Crawford Laboratories*,

Inc. (1996) 50 Cal.App.4th 1859, 1868-1869 (multi-million dollar sales to GSA's California depot over a period of six years insufficient to apply stream of commerce theory where seller had no control over final destination of its products). "Foreseeability that a product will enter California without having some control over its ultimate destination does not satisfy the due process clause of the United States Constitution."

Finally, the Court must also find that the exercise of jurisdiction in this case would be fair and reasonable. *Bridgestone Corp.*, supra, 99 Cal.App.4th at 774. The Court initially observes that this is not the typical personal injury case in which a manufacturer places a defective produce in the stream of commerce, and jurisdiction will allow a California consumer to seek redress from injuries caused by that product. This is also not a case where the sales of unregistered cigarettes is a criminal violation, and thus the ban on such sales would be enforceable against Indian tribes under Public Law 280.

This case involves state laws which allow some cigarette manufacturers and not others to sell their cigarettes in California. The primary burden of these laws falls on the manufacturer, i.e. to meet the financial responsibility requirements and ignition-propensity standards. There is no evidence here that NWS knew or should have known that Grand River, the cigarette manufacturer and another Indian-owned entity operating in Canada, was subject to and had not complied with these conditions when NWS sold the cigarettes to Big Sandy. As the state's general civil regulatory power does not extend to Indian tribes, there is uncertainty at the other end of the distribution as to whether the state's financial responsibility and other laws at issue in this case could be enforced against Big Sandy. It would be unfair to place the burden on an out-of-state distributor to determine, whenever it sells products to an Indian tribe located in California, what state laws are enforceable against the tribe with respect to any resales of those products. In the Court's view, that burden more fairly falls on the tribe importing the products for resale. The Court finds that, under these circumstances, it would not be reasonable or fair to exercise jurisdiction over NWS.

#### Transportation of cigarettes over state highways

Plaintiff contends that defendant's shipment of the cigarettes by truck over California roadways is sufficient to find jurisdictional contacts. However, there is no evidence in this case to on which the Court may find that defendant has directed the shipments on California roadways. Rather, the evidence shows only that defendant has sold cigarettes to a California Indian tribe, and at that tribe's direction, has shipped the cigarettes primarily to the tribe itself and occasionally to consignees. In these circumstances, mere shipment of goods over California roadways is insufficient to establish minimum contacts. *Lakeside Bridge and Steel Co. v. Mountain State Construction Co., Inc.* (7th Cir. 1979) 597 F.2d 596, 604 n.14 (out-of-state defendant's shipment of goods through state to another forum did not constitute minimum contacts not established solely by fact that goods were transited through a state).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

#### **COURT RULING**

The matter was argued and submitted. The Court took this matter under submission.

#### **SUBMITTED MATTER RULING**

Having taken this matter under submission, the Court now rules as follows. The tentative ruling is affirmed with the following comments and evidentiary rulings.

At the hearing, plaintiff contended that the law recognizes no distinction between shipments of cigarettes to Big Sandy and shipments of cigarettes to a WalMart store located in the State of California. The argument is fundamentally flawed as it ignores the fact that Big Sandy is a sovereign Indian tribe. Activities involving a sovereign physically located in California are not treated in the same manner as activities involving other entities located in California. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Nevada v. Hicks* (2001) 533 U.S. 353, 361-362. Absent Congressional authorization or a tribe's or consent, the courts do not have subject matter jurisdiction over a tribe. *Lawrence v. Barona Valley Ranch Resort &*



Casino (2007) 153 Cal.App.4th 1364, 1368-1370.

Plaintiff is correct that this is not a lawsuit against an Indian tribe. However, plaintiff too narrowly construes the subject matter of this action as merely sales by an out-of-state corporation to a California entity, as though the sales were a unilateral act of NWS. No sales would be made by NWS unless Big Sandy purchased the cigarettes. Thus, the activity which plaintiff contends is unlawful is not just the act of NWS in shipping cigarettes into California; it is a business transaction between an out-of-state corporation and an Indian entity located in California. This kind of business transaction is not only subject to limitations on a state's power to regulate interstate commerce, it is also subject to limitations imposed by the Indian Commerce clause. None of the authorities relied upon by plaintiff discuss minimum contacts where the activity involves interstate commerce and/or the Indian Commerce clause.

Defendant's request for rulings on its objections to plaintiff's evidence is granted as follows.

Defendant's objections to the declarations of Gerald K. Carlson (4/15/09 and 5/18/09), Chris Cook, Albert Allison (4/15/09 and 5/15/09), and Andrew Diaz are sustained on the ground of relevance. These declarations are not relevant in the absence of a showing that defendant exercised control over Big Sandy's sales to downstream customers. Having sustained the objections on the grounds of relevance, the court need not rule on defendants' other objections (e.g. hearsay, etc.).

Defendant's objections to the declaration of Monica Gable are overruled.

Defendant's objections to the lodging of the transcript of the Jo Anne Tornberg deposition are overruled.

#### **Declaration of Mailing**

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: September 28, 2009

E. Higginbotham, Deputy Clerk /s/ E. Higginbotham

Michelle Hickson  
Dennis Eckard  
P.O. Box 944255  
Sacramento, CA 94244

John Peebles  
Darcie Houck  
Robert Rhoades  
Fredericks Peebles & Morgan  
1001 Second Street  
Sacramento, CA 95814

FILED  
Superior Court Of California,  
Sacramento  
Dennis Eckhart, Executive  
Officer  
05/20/2005  
amc/tae  
By \_\_\_\_\_, Deputy  
Case Number  
24-2002-00014522-01-01-GDE

1 EDMUND G. BROWN JR.  
Attorney General of the State of California  
2 J. MATTHEW RODRIQUEZ  
Chief Assistant Attorney General  
3 DENNIS ECKHART, State Bar No. 070730  
Senior Assistant Attorney General  
4 MICHAEL M. EDSON, State Bar No. 177858  
Deputy Attorney General  
5 1300 I Street, Suite 125  
P.O. Box 944255  
6 Sacramento, CA 94244-2550  
Telephone: 916-323-3770  
7 Fax: 916-323-0813  
E-mail: Dennis.Eckhart@doj.ca.gov

8 Attorneys for Plaintiff  
9 People of the State of California

10  
11 SUPERIOR COURT OF CALIFORNIA  
12 IN AND FOR THE COUNTY OF SACRAMENTO  
13

Department  
Assignments  
Case Management 39  
Law and Motion 54  
Minors Compromise 22

14 People of the State of California ex rel. Edmund G.  
Brown Jr., Attorney General,

15 Plaintiff,

16 v.

17 Native Wholesale Supply Company, a corporation,  
18 and Does 1 through 20 inclusive,

19 Defendant.  
20

Case No.

COMPLAINT FOR  
INJUNCTION, CIVIL  
PENALTIES, CONTEMPT  
AND OTHER RELIEF

21 Plaintiff People of the State of California, through Edmund G. Brown Jr., Attorney  
22 General of the State of California, allege as follows:

23 NATURE OF ACTION

24 Since at least January 2004, defendant Native Wholesale Supply Company (Native  
25 Wholesale), a cigarette importer headquartered in New York state, has been selling tens of  
26 millions of Seneca and Opal brand cigarettes each year to businesses in California. None of  
27 these cigarettes are lawful for sale in California because neither their Canadian manufacturer,  
28 Grand River Enterprises/6 Nations, Ltd., (Grand River or Grand River Enterprises) nor the

1 Seneca and Opal brands have ever been listed on California's Tobacco Directory. Since  
2 June 29, 2004, no one may lawfully sell cigarettes in California unless both the brand and the  
3 manufacturer are listed on the Directory, which the Attorney General maintains, based upon  
4 whether the manufacturer is in compliance with state financial responsibility laws. (Rev. & Tax.  
5 Code, § 30165.1.)

6 In addition, neither Seneca nor Opal brand cigarettes comply with the ignition-  
7 propensity standards and related requirements for cigarettes sold in California, established by the  
8 California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf. Code, § 14950 et  
9 seq.). Since January 31, 2007, no one may lawfully sell cigarettes that do not comply with this  
10 Act.

11 Since at least January 2004, Native Wholesale has also been violating federal law by  
12 shipping cigarettes in interstate commerce to persons or entities in California that are not licensed  
13 as cigarette distributors by the California Board of Equalization but failing to report such  
14 shipments to the Board, as required by the Jenkins Act (15 U.S.C. § 375 et seq.).

15 Native Wholesale's violations of state and federal law constitute unfair competition  
16 pursuant to California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), which  
17 prohibits unlawful business acts or practices.

18 Native Wholesale's actions also violate injunctions issued by the Superior Court in and  
19 for the County of Sacramento against Grand River Enterprises, that enjoin Grand River from  
20 selling any cigarettes in California "either directly or through a distributor, retailer or other  
21 intermediary" because with knowledge of these injunctions Native Wholesale has acted as an  
22 agent or intermediary for Grand River and aided and abetted Grand River in the sale of cigarettes  
23 in California.

#### 24 PARTIES

25 1. The People of the State of California act through their duly elected Attorney  
26 General, Edward G. Brown Jr., the chief law officer of the state. (Cal. Const., art. 5, § 13.)

27 2. The Attorney General is charged with administering the tobacco directory law  
28 (Rev. & Tax. Code, § 30165.1) and may bring actions to enforce this law.

3. Health and Safety Code section 14955(f) authorizes the Attorney General to bring actions on behalf of the people of the state to restrain violations of the California Cigarette Fire Safety and Firefighter Protection Act. (Health & Saf. Code § § 14955, subd. (f).)

4. Business and Professions Code section 17204 authorizes the Attorney General to bring actions to enforce the California Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

5. Defendant Native Wholesale Supply Company is a closely held corporation chartered by the Sac and Fox Tribe of Oklahoma. On information and belief, Native Wholesale has its principal place of business in the state of New York.

6. The true names and capacities of defendants sued in this complaint under the fictitious names of Does 1 through 20, inclusive, are unknown to plaintiff who therefore sues such defendants by such fictitious names. Plaintiff will amend this complaint to show the true names of each when the same has been ascertained. Defendants sued herein as Does 1 through 20 are, and at all relevant times were, engaged with defendant Native Wholesale in the activities and conduct complained of herein.

7. Whenever reference is made in this Complaint to any act of Native Wholesale, such allegations shall mean that Native Wholesale through its agents, employees, or representatives, did or authorized such acts while actively engaged in the management, direction or control of the affairs of Native Wholesale's cigarette importing business and while acting within the scope and course of their duties.

8. At all relevant times, each of the defendants has acted as an agent, representative, employee, servant, partner, franchisee, affiliate, successor or joint venturer of each of the other defendants and has acted within the course and scope of such agency, representation, employment, service, partnership, franchise or joint venture.

## JURISDICTION AND VENUE

9. The violations of law alleged in this complaint occurred in Sacramento County and in other counties in California or occurred outside of California but were intended by defendants to have effects in California. This court has personal jurisdiction over defendant

1 Native Wholesale because defendant sold, offered for sale and profited from the sale of cigarettes  
2 to persons within the state of California, thus transacting business within this state and purposely  
3 and voluntarily availing itself of the privilege of conducting activities within the state of  
4 California.

5 10. Venue is proper in this county pursuant to Code of Civil Procedure section 395(a)  
6 because defendant Native Wholesale is not a resident of California.

### 7 **FACTUAL ALLEGATIONS**

8 11. Since at least January 1, 2004, Native Wholesale has been importing into the  
9 United States cigarettes manufactured by Grand River Enterprises in Canada, including Seneca  
10 and Opal brand cigarettes.

11 12. Since at least January 1, 2004, Native Wholesale has been shipping or causing to  
12 be shipped cigarettes manufactured by Grand River Enterprises from the Nevada International  
13 Trade Corporation, a Foreign Trade Zone located in Las Vegas, Nevada, to persons or businesses  
14 located in California, including but not limited to Big Sandy Rancheria, sometimes also known  
15 as BSR Distributing, in Auberry, California, and Huber Enterprise in Loleta, California.

16 13. During the past four calendar years, Native Wholesale shipped or caused to be  
17 shipped into California at least the following amounts of Seneca and Opal brand cigarettes  
18 manufactured by Grand River Enterprises:

- 19 • 2004 9,896,000 cigarettes (30 shipments)
- 20 • 2005 37,798,000 cigarettes (46 shipments)
- 21 • 2006 72,690,000 cigarettes (58 shipments)
- 22 • 2007 79,110,000 cigarettes (63 shipments; 58 since January 31, 2007)

23 14. From January 1, 2008, through May 14, 2008, Native Wholesale shipped or  
24 caused to be shipped at least 31,782,000 Seneca and Opal brand cigarettes into California (17  
25 shipments), of which 19,512,000 cigarettes (9 shipments) occurred after March 12, 2008.

26 15. Since the California Tobacco Directory was first established and posted on the  
27 Attorney General's public web site, on June 29, 2004, Seneca brand cigarettes have never been  
28 listed on the Directory.

1           16. Since the California Tobacco Directory was first established and posted on the  
2 Attorney General's public web site, on June 29, 2004, Opal brand cigarettes have never been  
3 listed on the Directory.

4           17. Since the California Tobacco Directory was first established and posted on the  
5 Attorney General's public web site, on June 29, 2004, Grand River Enterprises has never been  
6 listed on the California Tobacco Directory.

7           18. At all times relevant to this complaint, Big Sandy Rancheria has not been licensed  
8 by the California Board of Equalization as a cigarette distributor.

9           19. At one or more locations on tribal land in Auberry, California, Big Sandy  
10 Rancheria sells and offers for retail sale to non-Indians cigarettes manufactured by Grand River  
11 Enterprises that Big Sandy Rancheria has purchased from Native Wholesale.

12           20. Plaintiff is informed and believes that Big Sandy Rancheria distributes to other  
13 persons and businesses for retail sale to non-Indians in California cigarettes manufactured by  
14 Grand River Enterprises that Big Sandy Rancheria has purchased from Native Wholesale.

15           21. Native Wholesale knows or should know that Big Sandy Rancheria is selling and  
16 offering for retail sale to non-Indians in California and distributing to other persons and  
17 businesses for retail sale to non-Indians cigarettes manufactured by Grand River Enterprises that  
18 Big Sandy Rancheria has purchased from Native Wholesale.

19           22. At all times relevant to this complaint, Huber Enterprise, a business located on  
20 Wyot Indian Table Bluff land, has not been a California licensed cigarette distributor.

21           23. At a retail location in Loleta, California, Huber Enterprise sells and offers for  
22 retail sale to non-Indians cigarettes manufactured by Grand River Enterprises that Huber  
23 Enterprise has purchased from Native Wholesale.

24           24. Plaintiff is informed and believes that Huber Enterprise distributes to other  
25 persons and businesses for sale at retail to non-Indians in California cigarettes manufactured by  
26 Grand River Enterprises that Huber Enterprise has purchased from Native Wholesale.

27           25. Native Wholesale knows or should know that Huber Enterprise is selling and  
28 offering for retail sale in California to non-Indians and distributing to other persons and business

1 for retail sale to non-Indians cigarettes manufactured by Grand River Enterprises that Huber  
2 Enterprise has purchased from Native Wholesale.

3 26. Native Wholesale has not reported to the California Board of Equalization any of  
4 its cigarette shipments to Big Sandy Rancheria or Huber Enterprise.

5 27. Grand River Enterprises has never certified to the State Fire Marshal that any of  
6 the cigarettes it manufactures, including its Seneca and Opal brand cigarettes, meet the ignition-  
7 propensity standards established by the California Legislature in the California Cigarette Fire  
8 Safety and Firefighter Protection Act (Health & Saf. Code, §§ 14950 - 14960).

9 28. On December 14, 2004, the Superior Court in and for the County of Sacramento  
10 in case number 02AS07518, entitled People of the State of California, *ex rel.* Bill Lockyer,  
11 Attorney General, v. Grand River Enterprises/6 Nations Ltd., etc., entered a final judgment  
12 enjoining Grand River Enterprises for a period of two years from selling any cigarettes in  
13 California "either directly or through a distributor, retailer or other intermediary."

14 29. On December 19, 2006, the Superior Court in and for the County of Sacramento  
15 in case number 05AS04121, entitled People of the State of California, *ex rel.* Bill Lockyer,  
16 Attorney General, v. Grand River Enterprises/6 Nations Ltd., etc., entered a final judgment  
17 enjoining Grand River Enterprises for a period of two years from selling any cigarettes in  
18 California "either directly or through a distributor, retailer or other intermediary."

19 30. On October 29, 2007, the Superior Court in and for the County of Sacramento in  
20 case number 05AS01688, entitled People of the State of California, *ex rel.* Bill Lockyer, Attorney  
21 General, v. Grand River Enterprises/6 Nations Ltd., etc., entered a final judgment enjoining  
22 Grand River Enterprises for a period of two years from selling any cigarettes in California "either  
23 directly or through a distributor, retailer or other intermediary."

24 31. On March 7, 2008, the California Attorney General's Office mailed a letter,  
25 certified mail, return receipt requested, to the president of Native Wholesale Supply Company,  
26 Arthur Montour. A true and correct copy of this letter and of the return receipt, signed on  
27 March 12, 2008, by Tricia Thomas are attached to this Complaint as Exhibit A and incorporated  
28 in this complaint as though fully set forth. Among other things, the letter notified Native

1 Wholesale of the injunction described in paragraph 30, above, and asked Native Wholesale to  
2 confirm that it has ceased shipping Grand River cigarettes into the state of California.

3 32. Despite having received the letter described in paragraph 31, above, Native  
4 Wholesale has continued to ship for sale in California Seneca and Opal brand cigarettes from the  
5 Nevada International Trade Corporation to Big Sandy Rancheria and Huber Enterprise, in  
6 knowing violation of the October 29, 2007, injunction, described in paragraph 30, above.

7 33. Plaintiff is informed and believes and on that basis alleges that since at least  
8 January 1, 2004, Native Wholesale and Grand River have operated under an agreement or  
9 business arrangement by which Native Wholesale imports into the United States and distributes  
10 to persons or businesses operating on Indian land in California and other states cigarettes  
11 manufactured by Grand River.

#### 12 **FIRST CAUSE OF ACTION**

##### 13 **(Violation of California Tobacco Directory Law, against All Defendants)**

14 34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33 of this  
15 complaint.

16 35. California's tobacco directory law, Revenue and Taxation Code section 30165.1,  
17 subdivision (e)(2), prohibits any person from selling cigarettes or offering cigarettes for sale in  
18 California unless both the manufacturer and the cigarette brand meet the conditions for listing on  
19 the directory and, in fact, are listed on the directory at the time they are sold or offered for sale.  
20 (Rev. & Tax. Code, § 30165.1.)

21 36. California's tobacco directory law, Revenue and Taxation Code section 30165.1,  
22 subdivision (e)(3)(A), prohibits any person from selling or distributing cigarettes that the person  
23 knows or should know are intended to be distributed in violation of subdivision (e)(2).

24 37. California's tobacco directory law, Revenue and Taxation Code section 30165.1,  
25 subdivision (e)(3)(B), prohibits any person from acquiring, holding, owning, possessing,  
26 transporting, importing or causing to be imported cigarettes that the person knows or should  
27 know are intended to be distributed in violation of subdivision (e)(2).

28 ///



38. Since June 29, 2004, and continuing to the present, defendant Native Wholesale has sold, held, owned, possessed, imported, or caused to be imported cigarettes manufactured by Grand River Enterprises that Native Wholesale knew or should have known do not meet the conditions for listing on the directory and, in fact, have never been listed on the directory.

39. Defendant Native Wholesale's sales of and other activities relating to cigarettes of tobacco product manufacturers or brand families that are not included in California's tobacco directory violate Revenue and Taxation Code section 30165.1, subdivisions (e)(2) and (3).

## SECOND CAUSE OF ACTION

**(Violation of the California Cigarette Fire Safety and Firefighter Protection Act,  
against All Defendants)**

40. The People reallege and incorporate by reference paragraphs 1 through 33 of this complaint.

41. Section 14951, subdivision (a) of the California Cigarette Fire Safety and Firefighter Protection Act prohibits any person from selling, offering, or possessing for sale in California cigarettes not in compliance with the testing, certification and marking requirements of subdivision (a) of section 14952, subdivision (b) of section 14952, section 14953 and section 14954 of the Act.

42. Any person who sells cigarettes in California, other than at retail, in violation of the Act is subject to a civil penalty of up to \$10,000 for each sale. (Section 14955, subd. (a).)

43. Plaintiff is informed and believes and on that basis alleges that none of the cigarettes defendant Native Wholesale has sold to Big Sandy Rancheria and Huber Enterprise since February 1, 2007, have been tested, certified or marked as required by subdivision (a) of section 14952, subdivision (b) of section 14952, section 14953 and section 14954 of the Act.

### THIRD CAUSE OF ACTION

**(Contempt for Violation of Injunctions Against Grand River Enterprises,  
against All Defendants)**

44. The People reallege and incorporate by reference paragraphs 1 through 33 of this complaint.

1           45. Since at least March 12, 2008, the day Native Wholesale received notice from the  
2 Attorney General's Office of the court injunction, entered on October 29, 2007, that enjoins  
3 Grand River Enterprises from selling cigarettes in California either directly or through an  
4 intermediary, defendant Native Wholesale has knowingly acted as an intermediary for and in  
5 concert or participation with Grand River by selling cigarettes manufactured by Grand River in  
6 California; has knowingly violated the injunction; and is subject to remedies for contempt.

7           46. Since December 14, 2004, Native Wholesale has acted as an agent or intermediary  
8 for Grand River Enterprises or has otherwise aided and abetted Grand River Enterprises in  
9 violating the court injunctions entered against Grand River on October 29, 2007, December 19,  
10 2006, and December 14, 2004, respectively, by shipping Seneca and Opal brand cigarettes to  
11 persons and businesses in California for sale in California.

12           47. The People are informed and believe and on that basis allege that Native  
13 Wholesale had actual knowledge of each of these injunctions from at or about the time the  
14 People served Grand River Enterprises with notice of their entry and that despite that knowledge  
15 Native Wholesale acting for and in concert or participation with Grand River has shipped Seneca  
16 and Opal brand cigarettes to persons and businesses in California for sale in California; and as  
17 such Native Wholesale is in contempt of each of these injunctions.

18                           **FOURTH CAUSE OF ACTION**

19                   **(Violations of California Unfair Competition Law against All Defendants)**

20           48. The People reallege and incorporate by reference paragraphs 1 through 45  
21 of this complaint.

22           49. Pursuant to Business and Professions Code section 17203, the court may enjoin  
23 any person who engages, has engaged or proposes to engage in unfair competition.

24           50. Pursuant to Business and Professions Code section 17206, any person who  
25 engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil  
26 penalty up to \$2,500 for each violation.

27 ///

28 ///

1           51. A violation of subdivision (e) of section 30165.1 of the Revenue and Taxation  
2 Code constitutes unfair competition under section 17200 of the Business and Professions Code.  
3 (Section 30165.1, subd. (l).)

4           52. Defendant Native Wholesale has engaged in acts of unfair competition prohibited  
5 by California's unfair competition law (Business and Professions Code section 17200 et seq.) in  
6 that Native Wholesale has:

- 7           A. Sold cigarettes to persons and businesses in California for resale in California in  
8 violation of California's tobacco directory law (Rev. & Tax. Code, § 30165.1) because  
9 neither the cigarette brands nor their manufacturer have ever been listed on the  
10 California tobacco directory, as alleged in the first cause of action, above;
- 11           B. Sold cigarettes to persons and businesses in California for resale in California in  
12 violation of the California Cigarette Fire Safety and Firefighter Protection Act (Health  
13 & Saf. Code, §§ 14950-14960) because the cigarettes have not been tested, certified or  
14 marked as required by subdivision (a) of section 14952, subdivision (b) of section  
15 14952, section 14953 and section 14954 of the Act, as alleged in the second cause of  
16 action, above;
- 17           C. As an agent or intermediary for, or aiding and abetting, Grand River Enterprises to sell  
18 cigarettes in California in violation of court injunctions entered against Grand River  
19 Enterprises selling cigarettes directly or through an intermediary; and,
- 20           D. Shipped cigarettes to persons or entities in California that are not licensed cigarette  
21 distributors and failing to report such shipments to the California Board of  
22 Equalization in violation of the federal Jenkins Act, 15 U.S.C. § 375 et seq.

23                           **PRAYER FOR RELIEF**

24           The People pray for the following relief:

- 25           1. That, pursuant to Business and Professions Code section 17203, the court enjoin  
26 defendants, their successors, employees, agents, representatives, and all other persons acting in  
27 concert with them, from engaging in unfair competition as defined in Business and Professions  
28 Code section 17200 and specifically from the following acts and practices:

1 A. Selling to persons and businesses in California for resale in California any cigarettes  
2 whose brand family and manufacturer are not listed on the California tobacco  
3 directory, as required by California's tobacco directory law (Rev. & Tax. Code, §  
4 30165.1);

5 B. Selling to persons and businesses in California for resale in California any cigarettes  
6 that do not comply with the California Cigarette Fire Safety and Firefighter Protection  
7 Act (Health & Saf. Code, §§ 14950-14960), including but not limited to the testing,  
8 certification, and marking requirements of subdivision (a) of section 14952,  
9 subdivision (b) of section 14952, section 14953 and section 14954 of the Act;

10 C. Acting as an agent or intermediary for, or otherwise aiding and abetting, Grand River  
11 Enterprises to sell cigarettes in California in violation of court injunctions prohibiting  
12 Grand River from selling cigarettes in California; and,

13 D. Shipping cigarettes to persons or entities in California that are not licensed cigarette  
14 distributors and then failing to report such shipments to the California Board of  
15 Equalization in violation of the federal Jenkins Act, 15 U.S.C. § 375 et seq.

16 2. That, pursuant to Health and Safety Code section 14955(f), the court preliminarily  
17 and permanently enjoin defendants, their successors, employees, agents, representatives, and all  
18 other persons acting in concert with them, from selling or offering for sale cigarettes that do not  
19 comply with the California Cigarette Fire Safety and Firefighter Protection Act (Health & Saf.  
20 Code, §§ 14950-14960), including but not limited to the testing, certification, and marking  
21 requirements of subdivision (a) of section 14952, subdivision (b) of section 14952, section 14953  
22 and section 14954 of the Act;

23 3. That, pursuant to Business and Professions Code section 17206, the court assess  
24 against defendants a civil penalty of \$2,500 for each act of unfair competition, as alleged in the  
25 complaint, in a total amount to be determined by proof but not less than \$507,500, based on 211  
26 separate shipments of cigarettes from January 1, 2004 through May 14, 2008.

27 4. That, pursuant to Health and Safety Code section 14955(a), the court assess  
28 against defendants a civil penalty of \$10,000 for each sale of cigarettes that did comply with the

1 California Cigarette Fire Safety and Firefighter Protection Act, in a total amount to be  
2 determined by proof, but not less than \$750,000, based on at least 75 shipments from after  
3 January 31, 2007, to May 14, 2008.

4 5. That the court find defendants in contempt of the court's prior injunctions and  
5 impose an appropriate monetary fine on Native Wholesale.

6 6. That, pursuant to Revenue and Taxation Code section 30165.1(p), Health and  
7 Safety Code section 14955(f), and Code of Civil Procedure section 1218, the court award the  
8 People costs of investigation, expert witness fees, costs of the action, and reasonable attorney's  
9 fees.

10 7. That the court retain jurisdiction of this action.

11 8. That the court order defendant Native Wholesale to disclose any and all  
12 information needed to enforce a judgment and/or injunction.

13 9. That the court award such other and further relief as is appropriate and just.

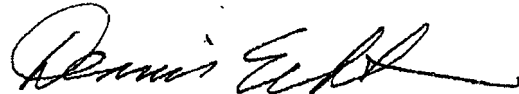
14  
15 Dated: June 30, 2008

16 Respectfully submitted,

17 EDMUND G. BROWN JR.  
Attorney General of the State of California

18 J. MATTHEW RODRIQUEZ  
Chief Assistant Attorney General

19 DENNIS ECKHART  
Senior Assistant Attorney General

20  
21 

22 DENNIS ECKHART  
Senior Assistant Attorney General  
23 Attorneys for Plaintiff  
24 People of the State of California

25 30491910.wpd  
26 SA2008301415  
27  
28

***EXHIBIT A***

EDMUND G. BROWN JR.  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CA 94244-2550

Telephone: 916-323-3770  
Facsimile: 916-323-0813  
E-Mail: Dennis.Eckhart@doj.ca.gov

March 7, 2008

*Certified Mail, Return Receipt Requested*

Mr. Arthur Montour  
Native Wholesale Supply, Inc.  
10955 Logan Road  
Perrysburg, New York 14129

RE: Injunction Against Sale of Cigarettes Manufactured by Grand River Enterprises

Dear Mr. Montour:

It has come to our attention that for some time now Native Wholesale Supply, Inc. has been selling Seneca brand cigarettes to businesses located in the state of California. Grand River Enterprises Six Nations Ltd. is manufacturing these cigarettes in Canada, and Native Wholesale Supply is importing these cigarettes into the United States. You are directing that these cigarettes be shipped by common carrier from a Foreign Trade Zone in Las Vegas, Nevada, to various locations in California. Neither Native Wholesale Supply nor any of the businesses to which these cigarettes are being shipped are licenced by the state of California as a cigarette distributor or wholesaler. We believe that these California businesses are selling these cigarettes to other businesses or directly to consumers in the state of California.

This is to advise you that the Superior Court of California in and for the County of Sacramento has entered three separate judgments against Grand River Enterprises for repeated failure to comply with California Health and Safety Code sections 104555-104557 (commonly known as the non-participating manufacturer (NPM) escrow deposit law) and for engaging in acts of unfair and unlawful competition in violation of California Business and Professions Code section 17200 et seq.

Each of these three judgments includes an injunction barring Grand River from selling any of its cigarettes in the state of California either directly or through an intermediary. The most recent such injunction was entered by the court on October 29, 2007, and provides, in pertinent part, that

Grand River is hereby enjoined and otherwise prohibited from selling any cigarettes in California for a two-year period commencing from the date of this order, either directly or through a distributor, retailer or other intermediary,

000578

Mr. Arthur Montour  
March 7, 2008  
Page 2

*including but not limited to*, the following brands: "Scenic 101," "MVP," "Opal" and "Capital."

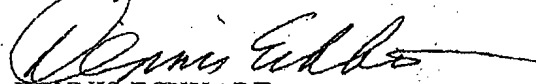
(Judgment p.2, para. D; italics original.) A true and correct copy of this judgment is enclosed.

Although Native Wholesale Supply is not a party to any of the injunctions entered by the California Superior Court against Grand River, Native Wholesale Supply is apparently acting as an intermediary for Grand River to sell its cigarettes in the state of California. As such, Native Wholesale Supply is violating the court's injunction and may be found in contempt of court and assessed monetary fines and penalties. Having now apprized Native Wholesale Supply, by this letter, of the terms of the court's injunction, we ask that Native Wholesale Supply cease and desist from any action that results or is likely to result in the shipment or sale in the state of California of any cigarettes manufactured by Grand River.

We also note that Native Wholesale Supply's actions, as described above, may also violate various provisions of state and federal law, including but not limited to the federal Jenkins Act (15 U.S.C. § 375 et seq.).

Please contact the undersigned immediately to confirm that Native Wholesale Supply has stopped shipping cigarettes manufactured by Grand River into the state of California and will refrain from such shipments in the future, until such time as Grand River has come into full compliance with California's NPM escrow deposit statute and has satisfied all outstanding judgments against it, including payment of all monetary penalties assessed by the court..

Sincerely



DENNIS ECKHART

Senior Assistant Attorney General

For EDMUND G. BROWN JR.  
Attorney General

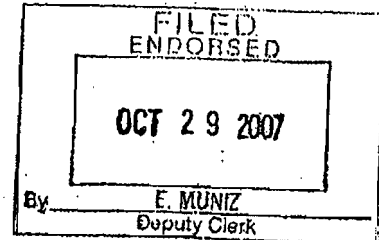
Enclosure

cc Bryan Porter



1 EDMUND G. BROWN JR.  
Attorney General of the State of California  
2 THOMAS GREENE  
Chief Assistant Attorney General  
3 DENNIS ECKHART  
Senior Assistant Attorney General  
4 WILLIAM F SOOHOO (SBN 80694)  
Deputy Attorneys General  
5 1300 I Street, Suite 125  
P.O. Box 944255  
6 Sacramento, CA 94244-2550  
Telephone: (916) 323-3853  
7 Fax: (916) 323-0813

8 Attorneys for Plaintiff



9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SACRAMENTO  
12

13 PEOPLE OF THE STATE OF CALIFORNIA, ex.  
14 Rel. BILL LOCKYER, Attorney General of the  
State of California,

15 Plaintiff,

16 v.

17 GRAND RIVER ENTERPRISES/6 NATIONS,  
18 LTD., a foreign corporation, and DOES 1 through  
100, inclusive,

19 Defendant.  
20

CASE NO. 05AS01688

~~PROPOSED~~ JUDGMENT BY  
COURT AFTER DEFAULT

21 THIS MATTER is before the Court on *Plaintiff's Request for Entry of Default*  
22 *Judgment* against Defendant GRAND RIVER ENTERPRISES/6 NATIONS, LTD., a foreign  
23 corporation, (hereafter, "GRAND RIVER"). This Court has considered *Plaintiff's Request for*  
24 *Entry of Default Judgment* and accompanying declarations, papers and exhibits thereto, and the  
25 entire record in this matter and hereby finds as follows:

26 1. The Attorney General of the State of California brings this action on behalf of  
27 Plaintiff, the People of the State of California, pursuant to California Health and Safety Code  
28 section 104557(c), to enforce the reserve fund requirements of California Health and Safety Code

1 sections 104555-104557.

2           2. The Defendant, **GRAND RIVER**, is a company that has transacted and is  
3 transacting business in California and manufactures cigarettes as defined in California Health and  
4 Safety Code section 104556(i)(1).

5           3. At least thirty (30) days have passed since the date of service of the Summons and  
6 Verified Complaint and **GRAND RIVER** has failed to appear and defend in this court.

7           4. **GRAND RIVER** was not at the time of service of said Summons and Verified  
8 Complaint, nor is now, an infant or minor, a financially incapable, incapacitated or incompetent  
9 person, nor in the military service as defined by Article 1 of the "Soldiers' and Sailors' Civil  
10 Relief Act of 1940" as amended (50 U.S.C. Appen. § 501 et seq.).

11           5. Jurisdiction has been reviewed and is proper pursuant to California Code of Civil  
12 Procedure, section 410.10.

13           6. Venue has been reviewed and is proper pursuant to California Code of Civil  
14 Procedure, section 393.

15           7. **GRAND RIVER** has failed and continues to fail and/or refuse to comply or  
16 otherwise bring itself into compliance with the reserve fund requirements of California Health  
17 and Safety Code, sections 104555-104557 and implementing regulations (Title 11, Calif. Code of  
18 Reg., §§ 999.10a through 999.14).

19           8. **GRAND RIVER** has engaged in and continues to engage in acts of unfair  
20 competition as defined in California Business & Professions Code, section 17200, in that  
21 **GRAND RIVER** has failed to establish the required reserve fund and failed to certify  
22 compliance to the Attorney General, in violation of California Health and Safety Code sections  
23 104555, 104556, and 104557 and implementing regulations.

24           9. Notwithstanding notice, **GRAND RIVER** failed to establish a Qualified Escrow  
25 Fund (as defined in California Health and Safety Code section 104556(f)) and also failed to make  
26 the annual deposits as required under California Health and Safety Code section 104557.  
27 Accordingly, **GRAND RIVER**'s actions constitute "knowing" violations.

28           10. **GRAND RIVER** has committed two or more knowing violations of California

1 Health and Safety Code section 104557 and is therefore subject to the maximum sanctions and  
2 penalties provided for under the reserve fund requirements of California Health and Safety Code  
3 section 104557.

4 **THEREFORE**, default having been entered by the clerk against **GRAND RIVER**, as  
5 requested by Plaintiff, **JUDGMENT** is accordingly entered in favor of the Plaintiff and against  
6 **GRAND RIVER** with respect to all claims, **AS FOLLOWS**:

7 **A. GRAND RIVER** shall, within fifteen (15) days of this Order, place into a Qualified  
8 Escrow Fund the following amounts as such amounts are adjusted for inflation as required by  
9 California Health and Safety Code section 104557(a)(2):

10 Sales during the year 2002:  
11 (32,013,800 units x \$0.0136125) plus 12.97356% for inflation for a total of  
\$492,324.22.

12 Sales during the year 2003:  
13 (75,352,720 units x \$0.0167539) plus 16.36276% for inflation for a total of  
\$1,469,023.88.

14 **B. GRAND RIVER** shall, within fifteen (15) days of this Order, provide Plaintiff with a  
15 list of the names of all cigarette brands manufactured by **GRAND RIVER**, as well as unit sales  
16 information and supporting documentation for sales in California in 2002 and 2003.

17 **C. GRAND RIVER** shall, within fifteen (15) days of this Order, pay civil penalties in  
18 the amount of 300% of the escrow amounts improperly withheld, for a total of \$5,884,044.30 for  
19 knowingly violating California Health and Safety Code section 104557(a)(2), (c), by failing to  
20 certify to the Attorney General for the State of California that it is in compliance with  
21 California's reserve fund statute and for knowingly failing to establish a qualified escrow fund  
22 as defined under California Health and Safety Code section 104556(f) and knowingly failing to  
23 deposit sufficient escrow funds into a qualified escrow fund as required under California Health  
24 & Safety Code section 104557.

25 **D. Pursuant to California Health and Safety section 104557(c)(3), GRAND RIVER** is  
26 hereby enjoined and otherwise prohibited from selling *any* cigarettes in California for a two-year  
27 period commencing from the date of this Order, either directly or through a distributor, retailer or  
28 other intermediary, *including but not limited to*, the following brands: "Scenic 101," "MVP,"

1 6) Costs:

TOTAL \$ 1,159  
\$7,851,551

2

3 7) Post-judgment simple interest at the rate of ten percent (10%) per annum on the  
4 judgment which consists of items 4 through 6 from the date of judgment is entered until full

5 IT IS SO ORDERED, ADJUDGED AND DECREED.

6

7

Dated: OCT 29 2007, 2007

8

JUDGE SHELLEYANNE W. L. CHIANG  
Judge of the Superior Court

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# SUMMONS (CITACION JUDICIAL)

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

NATIVE WHOLESALE SUPPLY COMPANY, a corporation and  
DOES 1 through 20 inclusive,

## YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDMUND G.  
BROWN JR., ATTORNEY GENERAL

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

Sacramento Superior Court  
720 Ninth Street  
Sacramento, CA 95814

CASE NUMBER:

(Número del Caso):

342007-00014593

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Dennis Eckhart, Sr. Assistant Attorney General, SB# 070730

Phone No.: 916-323-3770

Office of the Attorney General

Fax No.: 916-323-0813

1300 I Street, Sacramento, CA 95814

DATE: JUN 30 2008

(Fecha)

Clerk, by

(Secretario)

A. MACIAS

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

## NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): NATIVE WHOLESALE SUPPLY COMPANY

under: ☒ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)

4. ☐ by personal delivery on (date):

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, <small>number, and address</small> ): <b>Dennis Eckhart, Sr. Assistant Attorney General, SB# 070730</b> Office of the Attorney General 1300 I Street, Sacramento, CA 95814 TELEPHONE NO.: 916-323-3770 FAX NO.: 916-323-0813 ATTORNEY FOR (Name): <b>Attorney for Plaintiff</b>		FOR COURT USE ONLY  <b>FILED</b> <b>Superior Court Of California,</b> <b>Sacramento</b> <b>Dennis Jones, Executive</b> <b>Officer</b> <b>06/30/2008</b> <b>amacias</b> By _____, Deputy Case Number: <b>34-2008-00014583-CU-CL-GDS</b>	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF <b>SACRAMENTO</b> STREET ADDRESS: <b>720 Ninth Street</b> MAILING ADDRESS: CITY AND ZIP CODE: <b>Sacramento, CA 95814</b> BRANCH NAME:		JUDGE: DEPT:	
CASE NAME:		DEPT:	

**CIVIL CASE COVER SHEET**

☒ **Unlimited** (Amount demanded exceeds \$25,000)  
☐ **Limited** (Amount demanded is \$25,000 or less)

**Complex Case Designation**

☐ **Counter** ☐ **Joinder**

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

## 1. Check one box below for the case type that best describes this case:

**Auto Tort**

- ☐ Auto (22)  
☐ Uninsured motorist (46)

**Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort**

- ☐ Asbestos (04)  
☐ Product liability (24)  
☐ Medical malpractice (45)  
☐ Other PI/PD/WD (23)

**Non-PI/PD/WD (Other) Tort**

- ☒ Business tort/unfair business practice (07)  
☐ Civil rights (08)  
☐ Defamation (13)  
☐ Fraud (16)  
☐ Intellectual property (19)  
☐ Professional negligence (25)  
☐ Other non-PI/PD/WD tort (35)

**Employment**

- ☐ Wrongful termination (36)  
☐ Other employment (15)

**Contract**

- ☐ Breach of contract/warranty (06)  
☐ Rule 3.740 collections (09)  
☐ Other collections (09)  
☐ Insurance coverage (18)  
☐ Other contract (37)

**Real Property**

- ☐ Eminent domain/Inverse condemnation (14)  
☐ Wrongful eviction (33)  
☐ Other real property (26)

**Unlawful Detainer**

- ☐ Commercial (31)  
☐ Residential (32)  
☐ Drugs (38)

**Judicial Review**

- ☐ Asset forfeiture (05)  
☐ Petition re: arbitration award (11)  
☐ Writ of mandate (02)  
☐ Other judicial review (39)

**Provisionally Complex Civil Litigation**  
(Cal. Rules of Court, rules 3.400-3.403)

- ☐ Antitrust/Trade regulation (03)  
☐ Construction defect (10)  
☐ Mass tort (40)  
☐ Securities litigation (28)  
☐ Environmental/Toxic tort (30)  
☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

**Enforcement of Judgment**

- ☐ Enforcement of judgment (20)

**Miscellaneous Civil Complaint**

- ☐ RICO (27)  
☐ Other complaint (not specified above) (42)

**Miscellaneous Civil Petition**

- ☐ Partnership and corporate governance (21)  
☐ Other petition (not specified above) (43)

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. ☐ Large number of separately represented parties  
 b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve  
 c. ☐ Substantial amount of documentary evidence  
 d. ☐ Large number of witnesses  
 e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court  
 f. ☐ Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive

## 4. Number of causes of action (specify): Four (4)

5. This case ☐ is ☒ is not a class action suit.

## 6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 6/30/08

Dennis Eckhart, Senior Assistant Attorney General

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

1 EDMUND G. BROWN JR.  
Attorney General of California  
2 DENNIS ECKHART  
Senior Assistant Attorney General  
3 MICHELLE L. HICKERSON  
Deputy Attorney General  
4 State Bar No. 199748  
110 West A Street, Suite 1100  
5 San Diego, CA 92101  
P.O. Box 85266  
6 San Diego, CA 92186-5266  
Telephone: (619) 645-2461  
7 Fax: (619) 645-2012  
E-mail: Michelle.Hickerson@doj.ca.gov  
8 *Attorneys for Plaintiff*

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SACRAMENTO  
12  
13

14 **People of the State of California ex rel.  
Edmund G. Brown Jr., Attorney General,**

15  
16 Plaintiff,

17 v.

18 **Native Wholesale Supply Company, a  
corporation, and Does 1 through 20,**

19  
20 Defendant.  
21  
22  
23  
24  
25  
26  
27  
28

34-2008-00014593 CU--CL-GDS

**PEOPLE'S SUPPLEMENTAL  
OPPOSITION TO NATIVE  
WHOLESALE'S MOTION TO QUASH  
SERVICE OF SUMMONS**

Date: June 17, 2009  
Time: 9:00 a.m.  
Dept: 54  
Judge: The Hon. Shelleyanne W.L. Chang  
Trial Date: Not Set  
Action Filed: June 30, 2008

**EXHIBIT**

tabbies

000 86

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1 INTRODUCTION

2 Following Native Wholesale's Reply, the Court requested supplemental briefing on the four  
3 legal issues analyzed below. For a complete description of relevant facts, Plaintiff refers the  
4 Court to the "Summary of Facts" in its previous Opposition brief, filed April 20.

5 LEGAL ANALYSIS

6 I. WHETHER ACTIVITIES OCCURRING ONLY ON TRIBAL LAND CONSTITUTE  
7 MINIMUM CONTACTS FOR PURPOSES OF ACQUIRING PERSONAL JURISDICTION

8 Yes. The basic requirement of personal jurisdiction is that a court may not make a binding  
9 judgment against an individual with whom the forum has had no contacts. (*Int'l Shoe Co. v.*  
10 *Washington* (1945) 326 U.S. 310, 319.) But no case or rationale offered by Native Wholesale  
11 supports the view that contacts with tribes (e.g., Big Sandy Rancheria), tribal members, non-  
12 member Indians, or non-Indians on an Indian reservation by a non-member (e.g., Native  
13 Wholesale, which is not a member of any tribe with a reservation in California, and is a  
14 corporation, not an Indian) are not forum contacts with California.

15 All of the controlling case law starts with the premise that Indian reservations *are* part of  
16 California. "An Indian tribe's sovereignty is not that of a state. The attributes of sovereignty  
17 possessed by [a] Tribe *do not negate the fact that [a] Reservation is a part of the State of*  
18 *California*. . . . California need not treat [a] Tribe as it treats other states." (*Chemehuevi Indian*  
19 *Tribe v. California State Bd. of Equalization* (9th Cir. 1986) 800 F.2d 1446, 1450 [emphasis  
20 added]; see also *Nevada v. Hicks* (2001) 533 U.S. 353, 361-362 [inherent sovereign powers of  
21 Indian tribe do not extend to activities of nonmembers, "State sovereignty does not end at a  
22 reservation's border . . . . Ordinarily, it is now clear, an Indian reservation is considered part of  
23 the territory of the State."] [citations omitted.]; *Acosta v. San Diego County* (1954) 126  
24 Cal.App.2d 455, 465 [counties must provide public assistance to reservation Indians, "Indians  
25 living on reservations in California are citizens and residents of this state"].) Accordingly  
26 activities on a reservation are activities in California and there is no reason why such contacts  
27 would not count for purposes of minimum contacts.

1 In the face of this undisputable legal fact, the only reason Native Wholesale offers to  
2 support its claim that contacts with a reservation do not count as contacts with California is its  
3 contention that reservations are different from the rest of California because California law does  
4 not apply on them. "Plaintiff has not made an evidentiary or legal showing, by preponderance of  
5 the evidence, that California law applies to any of the Indian reservations where Native  
6 Wholesale's direct customers are situated." (Reply at p. 4.)<sup>1</sup> This argument must be rejected  
7 because Native Wholesale's premise is false. An Indian reservation is not like a foreign country,  
8 or even a sister state, where California law does not apply. California in fact has extensive  
9 jurisdiction over conduct on reservations in California.

10 First, although not plenary or exclusive, California – like all states – has a certain amount of  
11 regulatory jurisdiction over conduct on a reservation. Although states generally lack regulatory  
12 jurisdiction over conduct that is solely between members of a given tribe on their reservation,  
13 when non-members are involved (e.g., Native Wholesale is not a member of the Big Sandy tribe),  
14 or when on-reservation conduct has off-reservation effects, state law can and does apply. (See,  
15 e.g., *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324 ["[a] State's regulatory interest  
16 will be particularly substantial if the State can point to off-reservation effects that necessitate  
17 State intervention"]; *Hicks, supra*, 533 U.S. at 362 ["When . . . state interests outside the  
18 reservation are implicated, States may regulate the activities of tribe members on tribal land"].)  
19 Thus, for example, in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*  
20 (1976) 425 U.S. 463, 464-465, the Court held that to the extent on-reservation "smoke shops" sell  
21 cigarettes to non-Indians and non-member Indians, a state law applied to require the Indian  
22 proprietor to add the tax to the sales price and aid the State's collection and enforcement of the  
23 tax. Similarly, in *Washington v. Confederated Tribes of Colville Reservation* (1980) 447 U.S.  
24 134, the Court found that a state has regulatory jurisdiction to require tribal businesses to collect  
25 excise tax on cigarettes sold to non-members.

26 <sup>1</sup> The only "direct customer" of which we know is Big Sandy Rancheria. Native  
27 Wholesale apparently does not dispute California's jurisdiction over its indirect customers –  
28 Black Hawk, Huber, and Native Buy. Contacts with indirect customers in California are  
sufficient to support California's jurisdiction. (See § III, below.)

1 Second, in addition to the sorts of regulatory jurisdiction that all states have on reservations,  
2 California, unlike most states, also has extensive adjudicatory jurisdiction. In what is known as  
3 Public Law 280 (P.L. 83-280, 67 Stat. 588), Congress granted six states broad jurisdiction over  
4 Indian country. Specifically, it granted California not only extensive criminal jurisdiction on  
5 Indian reservations (see 18 U.S.C. § 1162(a)), but also civil jurisdiction:

6 [California] shall have jurisdiction over civil causes of action between Indians or to  
7 which Indians are parties which arise in . . . Indian country . . . to the same extent that  
8 [it] has jurisdiction over other civil causes of action, and *those civil laws . . . that are*  
9 *of general application to private persons or private property shall have the same*  
*force and effect within such Indian country as they have elsewhere within the*  
*State.*

10 (28 U.S.C. § 1360(a) [emphasis added].) “In states where Public Law 280 applies, it radically  
11 shifts the balance of jurisdictional power toward the states and away from the federal government  
12 and the tribes.” (William C. Canby, Jr., *American Indian Law* 232 (4th ed. 2004).) Although  
13 Public Law 280 does not give states plenary regulatory jurisdiction beyond that described above  
14 (see *Bryan v. Itasca County* (1976) 426 U.S. 373, 389), it permits California to hear “civil causes  
15 of action between Indians or to which Indians are parties” even where the controversy arises on a  
16 reservation. (28 U.S.C. § 1360(a).)

17 To be clear: This case is not about Pub. L. No. 280, and the People do not contend that  
18 PL 280 directly confers either subject matter or personal jurisdiction over Native Wholesale – an  
19 out of state corporation. PL 280 is a complicated statute with a complicated history. We mention  
20 PL 280 only because the entire basis of Native Wholesale’s contention that its contacts with  
21 reservations in California are not contacts for the purposes of establishing personal jurisdiction is  
22 its false blanket assertion that California law does not apply on reservations. PL 280, along with  
23 the rules governing when a state has regulatory jurisdiction on reservations, puts the lie to that  
24 contention.

25 In short, the conduct of persons or entities on Indian reservations – whether tribal members  
26 or persons from off the reservation and out of the state (like Native Wholesale), is subject to a  
27 variety of state laws, unlike conduct occurring in a foreign country or a sister state. There is no  
28 reason why such conduct, therefore, should not constitute contacts with California.

1 The cases cited by Native Wholesale do not undermine this conclusion. They are fully  
2 consistent with exactly what was described above – the State has broad jurisdiction over activities  
3 that occur on an Indian reservation, except in certain categories of cases, which do not obtain  
4 here. The People do not contend, and have no reason to contend, that a reservation is the same as  
5 any other place in California. Reservations do provide an important refuge from state law for  
6 tribes and their members with respect to certain conduct, particularly conduct that involves only  
7 tribes and their members and that is confined to the boundaries of their reservation. In keeping  
8 with these protections, courts have held that, for example, a county could not enforce a zoning  
9 ordinance to prevent a tribal member from developing his land on the reservation, because such  
10 conduct involved “on-reservation activities of tribal members,” which did not have significant  
11 off-reservation effects. (See *Gobin v. Snohomish County* (9th Cir. 2002) 304 F.3d 909, 917 [cited  
12 in NWS Reply at p. 4]; see also *Cayuga Indian Nation of New York v. Village of Union Springs*  
13 (N.D.N.Y. 2004) 317 F.Supp.2d 128, [local governments could not enforce zoning and land use  
14 laws to regulate tribal activities occurring only on reservation; cited in Reply at p. 4].)

15 Similarly consistent with the general rules is *State ex rel. Flammond v. Flammond* (Mont.  
16 1980) 190 Mont. 350 (see Reply at p. 5), where the state court in a child support case lacked  
17 jurisdiction over the father who was a tribal member living on a reservation and the cause of  
18 action to enforce support payments arose “solely from his domestic relations” on the reservation.  
19 Not only is this conclusion consistent with the general rule limiting most states’ subject matter  
20 jurisdiction when the conduct involved pertains only to tribal members on reservations, this  
21 Montana decision is significantly inapposite to the action before this California court, because it  
22 was based, importantly, on the fact that Montana – unlike California – is not subject to the broad  
23 grant of jurisdiction over Indian reservations conferred by PL 280. (See *id.* at p. 352.) Native  
24 Wholesale’s citation to *North Pacific Insurance Company v. Switzler* (1996) 143 Or. App. 223, is  
25 inapposite for the same reason, because the reservation had been expressly exempted from the  
26 reach of PL 280, unlike any of the reservations at issue here. (See *id.* at p. 228.)

1 In summary, Native Wholesale's only argument as to why its sales to Big Sandy, Black  
2 Hawk, Huber, etc. do not count as contacts in California is that California law does not apply on  
3 Indian reservations. And that blanket assertion is patently false. Even if Native Wholesale had  
4 argued only that California lacks jurisdiction over the specific type of transaction at issue here –  
5 its sales to a tribe (Big Sandy) and its deliveries to individuals and corporations that merely are  
6 situated on reservations but that are neither tribes nor tribal members (and it did not so argue,  
7 either in its Motion to Quash or in its Reply) – that argument also would have been to no avail.  
8 First, none of the cases Native Wholesale cites are relevant to such an argument since they all  
9 pertain to the limits on a state's jurisdiction over a tribal member on his or her own reservation.  
10 This action is not about a tribe or tribal member acting within the confines of a reservation in  
11 California: Native Wholesale is not a member of the Big Sandy tribe, nor the Agua Caliente Band  
12 of Cahuilla Indians on whose reservation Black Hawk and Native Made are located, nor of the  
13 Wyot Indian Table Bluff tribe where Huber Enterprise is located. It is a dispute between the state  
14 of California and an out of state corporation (Native Wholesale) using a California tribe as a  
15 middleman to distribute illegal cigarettes to the California public in general. (See Section III,  
16 below, detailing the off-reservation effects involved.) When on-reservation conduct, such as the  
17 sale of cigarettes, has off-reservation effects, a state has jurisdiction to regulate the conduct of  
18 even a tribe or tribal member, much less non-members like Native Wholesale who enjoy little  
19 protection on a reservation not their own.<sup>2</sup> (See e.g., *Moe, supra*, 425 U.S. at pp. 464-465.)

20 **II. WHETHER THE TRANSPORTATION OF GOODS THROUGH THE STATE OF**  
21 **CALIFORNIA IS SUFFICIENT TO ESTABLISH MINIMUM CONTACTS EVEN THOUGH**  
22 **THE ULTIMATE DESTINATION OF THE GOODS IS A TRIBAL RESERVATION**

23 We assume this question asks whether transportation of goods alone, regardless of their  
24 destination – an Indian reservation in California, downtown Los Angeles, or another state or  
25 foreign country – is sufficient to establish minimum contacts. On that assumption, the answer, at  
26 least here, is: Yes because the transportation of cigarettes is itself a violation of California law.

27 <sup>2</sup> See, e.g., *Montana v. United States* (1981) 450 U.S. 544 [“the inherent sovereign powers  
28 of Indian tribe do not extend to activities of nonmembers”]; *Hicks, supra*, 533 U.S. at p. 353  
[tribe had no power to regulate search by state officers investigating off-reservation crime even  
though search was of Indian-owned residence on tribal trust land].



1           **A. Native Wholesale's Transport of Cigarettes in California Violates**  
2           **California Law, Creating the Nexus Required for Exercise of Jurisdiction**

3           Mere transportation of goods through California in connection with the commission of an  
4 offense in another state (or on a reservation to the extent that a reservation may be considered like  
5 another state (but see *Chemehuevi*, *supra* [reservations are not like sister states]) may not be  
6 sufficient contact with California to support California's jurisdiction over the transporter, because  
7 specific jurisdiction requires a "connection between the defendant's forum activities and the  
8 plaintiff's claim." (See *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1068.)  
9 Hence, for example, in *Scullin Steel Co. v. Nat'l Ry. Utilization Corp.* (8th Cir. 1982) 676 F.2d  
10 309 (relied on by Native Wholesale) the court's observation that the defendant's contacts in that  
11 case were too "secondary" or "ancillary" to provide a basis for exercising jurisdiction. (*Scullin*,  
12 676 F.2d at p. 314.)

13           But here there is a substantial nexus because the transportation itself is an offense.  
14 California's Tobacco Directory Statute prohibits any person from *transporting* cigarettes where  
15 the brand or its manufacturer not listed on the directory that the person knows or should know are  
16 intended to be distributed in violation of law. (Complaint ¶ 35 and 37; Rev. & Tax. Code, §  
17 30165.1, subd. (e)(3)(B).) And Native Wholesale is guilty of violating this statute: it transports  
18 cigarettes in California; it knows those cigarettes are being distributed in violation of law.

19           **1. Native Wholesale Transports Cigarettes in the State**

20           Contrary to Arthur Montour's assertions, Native Wholesale itself directs shipments to  
21 entities in California via the Foreign Trade Zone (FTZ) in Las Vegas Nevada. At least until  
22 August 2008, Native Wholesale itself specifically instructed the FTZ to release cigarettes for  
23 transport to specified buyers/consignees in California, including naming the carrier to be used to  
24 transport the cigarettes to California. (Tornberg Deposition. 27:16-36:4, attached as Exhibit I;  
25 37:3-38.19, Exh. 2<sup>3</sup>; Gable Dec. Exh. E.) Native Wholesale alone, not the California buyer (Big  
26 Sandy), nor the California recipients (Big Sandy, Black Hawk Tobacco, Huber and Native

27           <sup>3</sup> Jo Anne Tornberg's Deposition was taken on November 20, 2008 in Las Vegas Nevada.  
28 Pursuant to local rule 3.03(F), copies of pertinent portions are attached to this brief as numbered  
exhibits.

1 Made<sup>4</sup>), directed all releases from the FTZ to California. (Tornberg Depo. 35:15-25, Exh. 3;  
2 47:23-49:25, Exh. 4 and 81:8-82:6, Exh. 5; See also Gable Dec. Exhs. BB & CC.)

3 **2. Native Wholesale Knows or Should Know that These Cigarettes are**  
4 **Intended to be Distributed in Violation of California Law**

5 In this way, Native Wholesale sold and shipped over 300 million Seneca and Opal  
6 cigarettes to Big Sandy alone, a small tribe with only 431 members. (Gable Dec. ¶¶ 7 & 10 ,  
7 Exhs. J & N.) Native Wholesale knew or should have known, based on the volume of cigarettes  
8 that it sells to Big Sandy (enough for every man, woman and child on the reservation to smoke  
9 500 cigarettes per day, see Section III below), that those cigarettes are distributed beyond the  
10 reservation. In any event, Native Wholesale *knows* that Big Sandy distributes its cigarettes to  
11 other California entities because Native Wholesale has shipped cigarettes directly to Big Sandy's  
12 customers, Black Hawk and Huber Enterprises. (See Gable Declaration ¶ 8 Exhs. L & M; see  
13 also Tornberg Depo. 35:15-25, Exh. 6.)

14 **3. That Big Sandy, Black Hawk and Huber Enterprises are Situated On**  
15 **Reservations Does Not Alter the Conclusion that Native Wholesale's**  
16 **Transportation of Cigarettes Violates Revenue and Taxation Code**  
**section 30165.1**

17 Finally, Native Wholesale cannot insulate itself from jurisdiction related to its illegal  
18 transportation of Opal and Seneca cigarettes by contending that Big Sandy's sales do not violate  
19 the directory statute because it is a tribe or because the other entities are immune due to their  
20 location on reservations. As well as distributing cigarettes to other smoke shops in California,  
21 Big Sandy sells cigarettes to California consumers in a shop on the reservation. (See Declaration  
22 of Carlson filed herewith.) Black Hawk is a California corporation which operates several  
23 smoke shops on a reservation in Palm Springs, from which it sells cigarettes to non-Indian  
24 California consumers. (See Declarations of Allison & Diaz , filed herewith; Gable Dec. ¶13-14  
25 and Exhs. Q & R) Huber Enterprises is a smoke shop located on a reservation in Loleta,  
26 California and also sells cigarettes to non-Indian consumers. (See Declaration of Chris Cook,

27 <sup>4</sup> The buyer for Native Made was Turtle Island, Isleta or "NWS", all located at the exact  
28 same address in Bosque Farms, NM. (See Gable Dec. ¶¶ 11 & 12 and Exhs. O, P & P-1.)

1 filed herewith; Gable Dec. Exhs. S, T & U.) This is exactly the sort of conduct California has  
2 jurisdiction to regulate even over a tribe on a reservation. (See *Moe, supra*, 425 U.S. at pp. 464-  
3 465 ["To the extent that the on-reservation "smoke shops" sell to non-Indians, the State may  
4 require the Indian proprietor to add the tax to the sales price and aid the State's collection and  
5 enforcement of the tax."]; and *Colville, supra*, 447 U.S. 134 [state has regulatory jurisdiction to  
6 require tribal business to collect excise tax on cigarettes sold to non-members].) Since California  
7 has jurisdiction to regulate sales of cigarettes by all three of these entities, Native Wholesale  
8 cannot use them to shield itself from jurisdiction as a result of its own violation.

9 **B. The Cases On Which Native Wholesale Relies are Irrelevant**

10 Native Wholesale relies on cases whose facts bear no resemblance to this case. For  
11 example, in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.* (7th Cir. 1979) 597  
12 F.2d 596, the plaintiff was attempting to hale the out-of-state defendant into court based on a  
13 single order of goods the defendant placed in Wisconsin. The court held that a nonresident  
14 defendant's ordering of goods from a Wisconsin plaintiff, coupled with defendant's knowledge  
15 that the goods would be manufactured in and shipped from Wisconsin, were constitutionally  
16 insufficient to allow personal jurisdiction over the defendant in Wisconsin. Similarly, in *Scullin*  
17 *Steel, supra*, 676 F.2d at pp. 309, 314, a Missouri seller sued a nonresident buyer for breach of a  
18 single contract. The court held that "[T]he use of interstate facilities (telephone, mail), making  
19 payments in the forum state, and the provision for delivery within the forum state are secondary  
20 or ancillary factors and cannot provide the 'minimum contacts' required by due process."

21 Here Native Wholesale has conducted business with Big Sandy on a regular basis, over a  
22 period of years, shipping tens of thousands of cigarettes into California every month and earning  
23 at least \$11.6 million dollars to date. In neither *Lakeside* nor *Scullin* did the transportation  
24 comprise any part of the cause of action. In this case, as discussed above, the transportation of  
25 cigarettes is itself a violation of law.

1 **III. WHETHER THE FACT THAT THE TRIBAL ENTITY THAT PURCHASES GOODS FROM A**  
2 **NON-RESIDENT ENTITY AND REDISTRIBUTES THOSE GOODS TO CALIFORNIA**  
3 **RESIDENTS IS SUFFICIENT TO SUPPORT A FINDING OF MINIMUM CONTACTS FOR THE**  
4 **PURPOSE OF ACQUIRING JURISDICTION OVER THAT NONRESIDENT ENTITY**

5 Yes. The fact that the middleman in a transaction happens to be a tribal entity is irrelevant.

6 This case requires just a straightforward application of the so-called stream of commerce test.

7 That test begins with the notion that the sort of contacts necessary to establish personal  
8 jurisdiction are those that demonstrate the defendant has, e.g., purposefully availed itself of the  
9 benefit of doing business in the forum state:

10 The United States Supreme Court has described the forum contacts necessary to  
11 establish specific jurisdiction as involving variously a nonresident who has  
12 “purposefully directed” his or her activities at forum residents (*Burger King, supra*,  
13 471 U.S. at p. 472), or who has “purposefully derived benefit” from forum activities  
14 (*id.* at p. 473), or “purposefully avail[ed himself or herself] of the privilege of  
15 conducting activities within the forum State . . . .”

16 (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 446.) Such purposeful  
17 availment can be shown in several ways. A common formulation is the stream of commerce test:  
18 “[P]lacing goods in the stream of commerce with the expectation that they will be purchased by  
19 consumers in the forum state indicates an intention to serve that market and constitutes purposeful  
20 availment . . . .” (*Bridgestone Corp. v. Superior Court* (2002) 99 Cal.App.4th 767, 772.)

21 As relevant to the Court’s question, how goods wend their way through the stream of  
22 commerce – whether directly, or indirectly through a middleman (an Indian tribe or any other  
23 middleman) – is not important. “[I]f the sale of a product of a manufacturer or distributor . . .  
24 arises from the efforts of the manufacturer or distributor to serve, directly *or indirectly*, the  
25 market for its product in other States, it is not unreasonable to subject it to suit in one of those  
26 States.” (*Bridgestone, supra*, 99 Cal.App.4th at p. 775 [quoting *World-Wide Volkswagen Corp. v.*  
27 *Woodson* (1980) 444 U.S. 286, 297-298; emphasis added].)

28 Here, Native Wholesale is serving the California markets indirectly, using Big Sandy as a  
middleman. Yet, as the quotation from *Bridgestone*, above, makes clear, such indirection – the  
existence of an intervening third party – is no bar to the exercise of jurisdiction.

A manufacturer whose products pass through the hands of one or more middlemen  
before reaching their ultimate users cannot disclaim responsibility for the total  
distribution pattern of the products. If the manufacturer sells its products in

1 circumstances such that it knows or should reasonably anticipate that they will  
2 ultimately be resold in a particular state, it should be held to have purposefully  
3 availed itself of the market for its products in that state.

4 (*Rowe v. Dorrough* (1984) 150 Cal.App.3d 901, 907 [quoting (*Buckeye Boiler Co. v. Sup. Ct.*  
5 (1969) 71 Cal.2d 893, 902].)<sup>5</sup>

6 Nothing in the rationale underlying any of the cases cited above turns on the identity of the  
7 middleman, its location or character, the fact that it might be a “tribal entity,” or even its  
8 sovereign status. Indeed, courts regularly find jurisdiction over a foreign defendant where the  
9 defendant’s product arrived through the stream of commerce in the forum state via an equally  
10 foreign middleman. (See, e.g., *A. Uberti & C. v. Leonardo* (Ariz. 1995) 892 P.2d 1354, 1362-63  
11 [en banc] [jurisdiction over Italian manufacturer whose guns were sold in Arizona through third  
12 party middleman in Massachusetts]; *Duple Motor Bodies, Limited v. Hollingsworth* (9th Cir.  
13 1969) 417 F.2d 231 [sale of product by foreign manufacturer via middleman in England to buyers  
14 in Hawaii]; *Barone v. Rich Bros. Interstate Display Fireworks Co.* (8th Cir. 1994) 25 F.3d 610,  
15 613-614 [Japanese corp. subject to suit in Nebraska where middleman was South Dakota  
16 distributor]; *Vermeulen v. Renault, U.S.A., Inc.* (11th Cir. 1983) 985 F.2d 1534, 1548 .) Instead,  
17 what counts is the character of the *defendant’s* conduct, knowledge, and expectations:

- 18 • The exercise of jurisdiction is permissible where a defendant releases its product into  
19 the stream of commerce, passing through the hands of one or more middlemen, when  
20 the defendant “knows or should reasonably anticipate that [its product] ultimately will  
21 be resold” in California. (*Rowe, supra*, 150 Cal.App.3d at p. 907; see also *Worldwide*  
22 *Volkswagen, supra*, 44 U.S. at pp. 297-298 [whether the defendant places its products  
23 into the stream of commerce with “the expectation that they will be purchased by  
24 consumers in the forum State”]);

25  
26 <sup>5</sup> *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, does not dictate a  
27 different conclusion. There was no majority opinion in that case; it did not overrule prior  
28 precedents; and California courts have declined to follow it, holding that *Asahi* did not alter the  
framework of the stream of commerce analysis. (*Bridgestone, supra*, 99 Cal.App.4<sup>th</sup> at pp. 776-  
777.)

- 1       • If the sale through a middleman is just an isolated occurrence, the exercise of  
2       jurisdiction may not be permissible, but repeated sales support the inference of  
3       purposeful availment. (*Bridgestone*, 99 Cal.App.4th at p. 994). “The stream of  
4       commerce refers not to unpredictable currents or eddies, but to the regular and  
5       anticipated flow of products from manufacture to distribution to retail sale. As long  
6       as a participant in this process is aware that the final product is being marketed in the  
7       forum State, the possibility of a lawsuit there cannot come as a surprise.” (*Asahi*,  
8       *supra*, 480 U.S. at p. 117 [Brennan, J., concurring]); or
- 9       • If the purchase or use of a product in California “generates gross income for the  
10      manufacturer and is not so fortuitous or unforeseeable as to negate the existence of  
11      an intent on the manufacturer's part to bring about this result,” the manufacturer has  
12      obtained the benefits and protections of California's laws, and the requirement of  
13      purposeful availment is satisfied. (*Bridgestone*, *supra*, 99 Cal.App.4th 767 at pp.  
14      775-776 [citations and quotations omitted].)

15       All of these factors – none of which depend on the status or location of the middleman –  
16      obtain here. There can be no question that Native Wholesale expected, knew, or should have  
17      known that its cigarettes sold to Big Sandy were being be resold in California. The most damning  
18      evidence of this are the invoices, generated by Native Wholesale itself, showing that Native  
19      Wholesale directly shipped many of the cigarettes it sold to Big Sandy not to the tribe, but to third  
20      party retailers in the state, such as Huber in Loleta and Black Hawk Tobacco in Palm Springs.  
21      (Gable Dec. Exh. L) (Cf., e.g., *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.* (9th Cir.  
22      1980) 633 F.2d 155, 159 [“When it knew [its product] was bound for Montana Pillsbury could  
23      have objected or made other arrangements if it found exposure to Montana's long-arm jurisdiction  
24      unacceptable”].)

25       In these circumstances, jurisdiction over a foreign defendant can be had even where the  
26      defendant's product arrived in the forum via a foreign middleman. For example, in *Barone v.*  
27      *Rich Bros. Interstate Display Fireworks Co.*, *supra*. 25 F.3d at p. 610, a Japanese corporation,  
28      Hosoya, was held to be subject to suit in Nebraska where the middleman was South Dakota

1 distributor. The Court noted that Hosoya “certainly benefited from the distribution efforts” of the  
2 South Dakota distributor, and although “Hosoya claims to have had no actual knowledge that  
3 Rich Bros. distributed fireworks into Nebraska, *such ignorance defies reason and could aptly be*  
4 *labeled ‘willful.’”* (*Id.* at pp. 613-614 [emphasis added].) The court’s reasoning included that  
5 South Dakota is not a particularly populous state. (*Ibid.*)

6 Native Wholesale similarly benefits from Big Sandy’s redistribution efforts. Big Sandy is a  
7 very small tribe in remote location in California. Native Wholesale sometimes ships cigarettes  
8 directly to Big Sandy’s California customers. As to those cigarettes that Native Wholesale did  
9 not personally direct to California retailers, it had to know that its cigarettes sold and shipped to  
10 Big Sandy were ending up in the hands of California consumers. This is so because even if every  
11 one of Big Sandy’s 431 members were a smoker, they could not possibly have smoked, for  
12 example, all 87 million cigarettes Native Wholesale shipped and sold to Big Sandy alone in 2007.  
13 (Gable Dec. Exhs. J & N.) This would have required every man, woman, and child in the tribe to  
14 have smoked more than 500 cigarettes (25 packs) a day, or approximately one cigarette every  
15 three minutes, 24 hours a day. Big Sandy had to be reselling the cigarettes off the reservation,  
16 and even a casual call to Big Sandy shows that such sales were to California residents.  
17 (Declaration of Allison, filed herewith, ¶ 5.)

18 Finally, Native Wholesale has derived millions of dollars in gross income from sales in  
19 California. Since the end of 2003, Native Wholesale has made *at least 277* separate shipments,  
20 totaling at least 328,884,000 cigarettes, to California, generating gross revenues of at least  
21 \$11,682,854.51. (Gable Dec. ¶ 9., Exh. I.) Native Wholesale cannot plausibly contend that these  
22 sales, and this income, are “so fortuitous as to negative the existence of an intent . . . to bring  
23 about this result.” (*Bridgestone, supra*, 99 Cal.App.4th at pp. 767, 776.)

24 Native Wholesale undoubtedly will argue that none of the above matters, because the  
25 retailers at the end of the supply chain – Black Hawk Tobacco, Huber Enterprise, Native Trading,  
26 and so forth – all are situated on Indian reservations. That argument is wrong on at least three  
27 levels. First, as noted above, being on an Indian reservation is not like being in a foreign country  
28 or even in a sister state. If you are on a reservation in California, you are in California. Second,

1 these retailers all sell cigarettes to any willing buyer – Indian or non-Indian; tribal member or not.  
2 (Declarations of Allison, Cook, Carlson & Diaz). They simply are retail outlets selling to the  
3 general public and thus subject to state jurisdiction. (Cf. *Moe*, *supra*, 425 U.S. at pp. 464-465.)  
4 Third, these retailers, although situated on Indian reservations, are not “tribal entities” in any  
5 sense. Consider, for example, Black Hawk. Black Hawk is a California corporation. (Gable  
6 Dec. Exh. Q). Consequently, it is a resident of the State of California. (*Federal Mach. & Welder*  
7 *Co. v. Superior Court* (1968) 259 Cal.App.2d 927, 930 [“A corporation is a resident of the state in  
8 which it is created”].) Moreover, a corporation, even one wholly owned by members of the tribe  
9 on whose reservation it sits, is not a tribal member or Indian itself. (See *Dole Food Co. v.*  
10 *Patrickson* (2003) 538 U.S. 468, 474-475 [corporations have identities separate from that of their  
11 owners]; *Baraga Products, Inc. v. Comm’r* (W.D. Mich. 1977) 971 F.Supp. 294, 296  
12 [incorporated business entity not an enrolled member of an Indian tribe simply because its sole  
13 shareholder is]; *id.* at p. 298 [“a corporation is not an ‘Indian’ for purposes of immunity” from the  
14 application of state law].) These entities simply are California residents who sell Native  
15 Wholesale’s cigarettes at retail to any willing buyer.<sup>6</sup>

16 **IV. AT WHAT POINT DOES PERSONAL JURISDICTION ATTACH? UPON SHIPMENT OF**  
17 **GOODS THROUGH THE STATE OF CALIFORNIA? UPON DELIVERY OF GOODS TO**  
18 **TRIBAL ENTITY ON TRIBAL LANDS? UPON REDISTRIBUTION OF THOSE GOODS TO**  
19 **CALIFORNIA RESIDENTS?**

20 The Supreme Court has made clear that there is no magic point in time or magic event that  
21 is the key to determining jurisdiction:

22 The Court long ago rejected the notion that personal jurisdiction might turn on  
23 “mechanical” tests, or on “conceptualistic . . . theories of the place of contracting or of  
24 performance.” Instead, we have emphasized the need for a “highly realistic”  
25 approach that recognizes that a “contract” is “ordinarily but an intermediate step  
26 serving to tie up prior business negotiations with future consequences which  
27 themselves are the real object of the business transaction.” It is these factors—prior  
28 negotiations and contemplated future consequences, along with the terms of the

<sup>6</sup> If Native Wholesale has attempted to use a “tribal entity” as an intermediate purchaser to  
insulate itself from California’s jurisdiction, use of a middleman of any sort – tribal or otherwise  
– cannot immunize Native Wholesale from the reach of California law. “[A] truly interstate [or  
international] business may not shield itself from suit by a careful but formalistic structuring of its  
business dealings.” (*Vermeulen v. Renault, U.S.A., Inc.*, *supra*, 985 F.2d at p. 1548 [quoting  
*Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, (1st Cir. 1988)] 857 F.2d 26, 30.)



1 contract and the parties' actual course of dealing—that must be evaluated in  
2 determining whether the defendant purposefully established minimum contacts within  
the forum.

3 (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 478-479 [internal citations omitted].)

4 The test is whether “the defendant's conduct and connection with the forum State are such  
5 that he should reasonably anticipate being haled into court there.” (*World-Wide Volkswagen*,  
6 *supra*, 444 U.S. at p. 297.) In applying that test, a court must look to the totality of  
7 circumstances. “These guidelines are not susceptible of mechanical application, and the  
8 jurisdictional rules are not clear-cut. Rather, a court must weigh the facts in each case to  
9 determine whether the defendant's contacts with the forum state are sufficient.” (*Burger King*,  
10 *supra*, 471 U.S. at pp. 478-9.) “[T]he criteria by which we mark the boundary line between  
11 those activities which justify the subjection of a corporation to suit, and those which do not,  
12 cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend . .  
13 . upon the quality and nature of the activity in relation to the fair and orderly administration of the  
14 laws which it was the purpose of the due process clause to insure.” (*International Shoe*, *supra*,  
15 326 U.S. at p. 319.)

16 Thus, the relevant inquiry is not at what specific point on a timeline jurisdiction attaches,  
17 but rather what sorts of conduct, viewed *under all of the circumstances*, are sufficient to conclude  
18 that it is *fair* to exercise jurisdiction over Native Wholesale in California. The end result of the  
19 analysis turns on whether Native Wholesale’s contacts with California are due to mere  
20 happenstance such that it could not be expected to “reasonably anticipate” being haled into court  
21 here, or not. (See *Bridgestone*, *supra*, 99 Cal.App.4th at pp. 775-776.)

22 The answer in this case is that any one of the activities mentioned by the Court – the  
23 transportation of at least 277 shipments of unlisted cigarettes in violation of California law, the  
24 \$11.6 million in sales to “tribal entities,” or the downstream distribution of those cigarettes to  
25 California consumers – would be sufficient to confer jurisdiction over Native Wholesale. Not to  
26 mention that it has sent at least one employee to California (Gable Dec. ¶ 22 and Exh. Z) and  
27 hired a California-based customs broker to facilitate their passage through customs as part of their  
28 release from the FTZ for final shipment to California. (Gable Dec. ¶ 23 and Exh. AA.)

1 Section II, above, demonstrates that Native Wholesale's transportation of goods in  
2 California is sufficient on its own to support jurisdiction. Section I, above, demonstrates that  
3 transactions with entities on reservations, such as the sale and delivery of goods to them by a non-  
4 member, is sufficient on its own to support jurisdiction; and Section III, above, demonstrates that  
5 the re-distribution to California residents of Native Wholesale's cigarettes is sufficient on its own  
6 to support jurisdiction, because that redistribution is not unexpected or fortuitous.

7 Contacts sufficient to support personal jurisdiction exist "whenever the defendant  
8 purposefully and voluntarily directs its activities toward the forum state in an effort to obtain a  
9 benefit from that state." (*Snowney v. Harrah's Entertainment, Inc.*, *supra*, 35 Cal.4th at pp. 1054,  
10 1067.) Therefore, Native Wholesale's transportation in California of contraband cigarettes in  
11 violation of the directory statute *and* its millions of dollars of sales to Big Sandy *and* the  
12 foreseeable redistribution of its cigarettes to California consumers from which it benefits are *each*  
13 sufficient to support personal jurisdiction over Native Wholesale in this case.

#### 14 CONCLUSION

15 Allowing Native Wholesale to escape personal jurisdiction in a forum it has exploited for  
16 years for pecuniary gain while repeatedly violating the laws of the State would constitute a  
17 manifest unfairness to the public health interests of the People of California.

18 Dated: May 20, 2009

Respectfully Submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
DENNIS ECKHART  
Senior Assistant Attorney General

for MICHELLE L. HICKERSON  
Deputy Attorney General  
Attorneys for Plaintiff

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1 JOHN M. PEEBLES (BAR No. 237582)  
2 DARCIE L. HOUCK (BAR No. 196556)  
3 A. ROBERT RHOAN (BAR No. 231949)  
4 **FREDERICKS PEEBLES & MORGAN LLP**  
5 1001 Second Street  
6 Sacramento, California 95814  
7 Telephone: (916) 441-2700  
8 Facsimile: (916) 441-2067

9 Attorney for Defendant  
10 **NATIVE WHOLESALE SUPPLY COMPANY**

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **IN AND FOR THE COUNTY OF SACRAMENTO**

13 **PEOPLE OF THE STATE OF CALIFORNIA**  
14 ex rel. EDMUND G. BROWN, Attorney  
15 General,

16 Plaintiff,

17 v.

18 **NATIVE WHOLESALE SUPPLY**  
19 **COMPANY, a Sac and Fox Nation**  
20 **Corporation, and DOES 1 to 20, inclusive,**

21 Defendants.

Case No. 34-2008-00014593 CU-CL-GDS

**DEFENDANT NATIVE WHOLESALE  
SUPPLY COMPANY'S REPLY TO THE  
PEOPLE'S SUPPLEMENTAL  
OPPOSITION TO ITS MOTION TO  
QUASH SERVICE OF SUMMONS**

Date : June 17, 2009  
Time : 9:00 a.m.  
Dept. : 54  
Judge : Judge Shelleyanne W.L. Chang

**FILED  
ENDORSED**

2009 JUN -3 PM 4:11  
LAW AND MOTION #1

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1           **I. INTRODUCTION**

2           On May 1, 2009, this Court issued an order requesting briefing on the following four issues:

- 3           1.     Whether activities occurring only on tribal lands constitute minimum contacts  
4                 for purposes of acquiring personal jurisdiction over a non-resident entity;
- 5           2.     Whether the transportation of goods through the State of California is  
6                 sufficient to establish minimum contacts, even though the ultimate destination  
7                 of the goods is a tribal reservation;
- 8           3.     Whether the fact that the tribal entity that purchases goods from a non-resident  
9                 entity and redistributes those goods to California residents is sufficient to  
10                support a finding of minimum contacts for the purpose of acquiring jurisdiction  
11                over that non-resident entity; and
- 12           4.     At what point does personal jurisdiction attach? Upon shipment of goods  
13                 through the State of California? Upon delivery of goods to a tribal entity  
14                 located on tribal lands? Upon redistribution of those goods to California  
15                 residents?

16           This memorandum first addresses the Court's fourth inquiry concerning the point at which  
17           personal jurisdiction attaches by discussing the analytical framework for determining whether the  
18           minimum contacts requirements of the due process clause are met. As explained more fully below,  
19           personal jurisdiction attaches at the point where all the elements of the minimum contacts analysis are  
20           satisfied. Here the contacts identified by the Court do not satisfy the minimum contacts analysis.  
21           Accordingly, this Court does not have personal jurisdiction over Native Wholesale ("NWS"). This  
22           memorandum then applies this analytical framework to explain why this Court lacks specific  
23           jurisdiction over NWS with respect to the Court's first, second and third questions, and addressees  
24           why Plaintiff's assertions to the contrary are wrong.<sup>1</sup>

25           Plaintiff's assertions confuse subject matter jurisdiction with personal jurisdiction in an  
26           attempt to avoid addressing the issue at the heart of this matter; whether Tribal lands are outside of  
27           the jurisdiction of California for civil regulatory purposes and whether NWS has legally cognizable  
28           minimum contacts with California outside of Tribal lands. An appropriate analogy can be drawn  
29           with diversity jurisdiction under 28 U.S.C. § 1332. A federal court may have subject matter

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<sup>1</sup> NWS incorporates by reference the arguments made in its other supporting papers concerning its motion to quash.

1 jurisdiction over an action that involves two litigants domiciled in separate states. However, this does  
2 not provide personal jurisdiction over a litigant that does not have sufficient contacts with the forum  
3 state. The State finding no support for its position has attempted to conflate these two separate  
4 issues. Yet, none of the cases the State cites regarding application of state law to reservation activity  
5 support its position that the State has personal jurisdiction over NWS, despite this attempt to blur the  
6 line between subject matter and personal jurisdiction.

## 7 **II. LEGAL ARGUMENT**

### 8 **A. This Court Lacks Specific Personal Jurisdiction Over NWS As Several** 9 **Elements of the Minimum Contacts Analysis Required by the Due Process** 10 **Clause of the Fourteenth Amendment for Determining Specific Personal** 11 **Jurisdiction Are Not Satisfied In This Action.<sup>2</sup>**

12 “A California court may exercise personal jurisdiction over a nonresident defendant to the  
13 extent allowed under the state and federal Constitutions.”<sup>3</sup> (*Healthmarkets, Inc. v. Super. Ct.* (2009)  
14 171 Cal.App.4th 1160, 1166, *citing* Code Civ. Proc., § 410.10.) In enacting its long-arm statute, the  
15 State of California “is limited by the due process constraints of the fourteenth amendment” to the  
16 federal Constitution. (*DeJames v. Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 284.)  
17 Generally, a Court determines “(1) whether there was state statutory authority for the exercise of  
18 jurisdiction; and (2) whether the exercise of jurisdiction comports with federal due process  
19 standards.” (*Fed. Ins. Co. v. Lake Shore, Inc.* (4th Cir. 1989) 886 F.2d 654, 657, fn. 2.) However,

20 <sup>2</sup> Plaintiff makes the confusing statement that “NWS apparently does not dispute California’s jurisdiction over its indirect  
21 customers – Black Hawk, Huber, and Native Buy. Contacts with indirect customers in California are sufficient to support  
22 California’s jurisdiction.” (People’s Supplemental Opposition to Native NWS’ Motion to Quash (“Supp. Opp.”), at p. 2,  
23 lines 26-28, fn. 2.) As an initial matter, personal jurisdiction over any of the referenced retailers is not at issue on this  
24 motion, as the only question before the Court is whether personal jurisdiction over NWS exists. Second, the basis of  
25 NWS’ argument is that contacts with Tribal lands are not contacts with California, therefore, NWS disputes the notion  
26 that this Court has jurisdiction, as a matter of law, over any entity or individual situated on Tribal lands such as the third-  
27 party retailers. Third, the third-party retailers referenced by Plaintiff are not direct purchasers of NWS, but purchase  
28 products sold from the Big Sandy Rancheria, a tribal entity, which is a direct purchaser of NWS. (Declaration of Arthur  
Montour at ¶¶ 1-7.)

25 <sup>3</sup> Courts proceed with heightened caution in applying the law of personal jurisdiction when the nonresident defendant is  
26 from another nation rather than another state. (*Sonora Diamond Corp. v. Super. Ct.* (2000) 83 Cal.App.4th 523, 536.)  
27 NWS is incorporated under the laws of a Tribal Nation, and its principal place of business is located on the reservation  
28 lands of another Tribal Nation. NWS submits that this Court is, therefore, charged to apply a higher degree of care when  
considering jurisdictional issues concerning entities incorporated under the laws and located on the lands of an Indian  
tribe.

1 here "the first question collapses into the second" since the California long-arm statute (Code Civ.  
2 Proc., § 410.10) "has been construed to extend jurisdiction to the outer limits of due process." (*Id.*)  
3 Therefore, "[t]he exercise of personal jurisdiction is constitutionally permissible only if the defendant  
4 has sufficient minimum contacts with [California] so that the exercise of jurisdiction does not offend  
5 traditional notions of fair play and substantial justice."<sup>4</sup> (*Healthmarkets, Inc.*, *supra*, 171 Cal.App.4th  
6 at p. 1166 [citations omitted].) Because Plaintiff has conceded that this Court lacks general personal  
7 jurisdiction over NWS, the only remaining issue is whether this Court lacks specific personal  
8 jurisdiction. (*See Pavlovich v. Super. Ct.* (2002) 29 Cal.4th 262, 269.)

9 The minimum contacts test for specific personal jurisdiction is satisfied when:

10 (1) the defendant has performed some transaction within the forum or otherwise  
11 purposefully availed himself of the privileges of conducting activities in the forum; (2)  
12 the claim arises out of or results from the defendant's forum-related activities, and (3)  
exercise of jurisdiction is reasonable.

13 (*Pebble Beach Co. v. Caddy* (9th Cir. 2006) 453 F.3d 1151, 1155; *Burger King Corp. v.*  
14 *Rudzewicz* (1985) 471 U.S. 462, 472 [same]; *accord Pavlovich v. Super. Ct.* (2002) 29 Cal.4th 262,  
15 269; *Jewish Defense Org. v. Super. Ct.* (1999) 72 Cal.App.4th 1045, 1054.)<sup>5</sup> "If any of the three  
16 requirements are not satisfied, jurisdiction in the forum would deprive the defendant of due process  
17 of law." (*Caddy, supra*, 453 F.3d at p. 1155.)

18 The burden is on Plaintiff to prove that specific personal jurisdiction over NWS is appropriate  
19 in this action. "When a nonresident defendant challenges personal jurisdiction, the plaintiff must  
20 prove, by a preponderance of the evidence, the factual basis that would justify the exercise of  
21 jurisdiction." (*F. Hoffman-La Roche, Ltd. v. Super. Ct.* (2005) 130 Cal.App.4th 782, 794.) Where a

22 <sup>4</sup> In analyzing whether this Court has personal jurisdiction over NWS, "federal law is controlling on the issue of due  
23 process under the United States Constitution" and this Court is "not bound by state cases, although they may be  
24 considered persuasive authority." (*Data Disc, Inc. v. Systems Technology Associates, Inc.* (9th Cir. 1977) 557 F.2d 1280,  
1286, fn. 3.) Accordingly, to the extent that federal decisions are more protective of NWS' federal due process rights,  
those decisions are controlling as limitations imposed by the United States Constitution on the reach of California's long-  
arm statute.

25 <sup>5</sup> When a non-resident entity purposefully avails itself of the privilege of conducting activities in California it has clear  
26 notice that it is subject to suit there, and if the risks of liability are too great it can sever its connection with the state.  
27 (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1997) 14 Cal.4th 434, 446-447.) "This element of fair warning gives 'a  
28 degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some  
minimum assurance as to where the conduct will and will not render them liable to suit.'" (*Id.*, quoting *World-Wide  
Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297 [emphasis added].)

1 Plaintiff does not satisfy its burden with respect to any element of this test, the other elements need  
2 not be addressed and the Court should find that it lacks personal jurisdiction over the matter. (*Caddy*,  
3 *supra*, 453 F.3d at p. 1155.) Plaintiff must submit “substantial evidence” which is admissible under  
4 the Evidence Code and other evidentiary rules to support its allegations of minimum contacts,  
5 otherwise a motion to quash for lack of personal jurisdiction must be granted. (*Jewish Defense Org.*,  
6 *supra*, 72 Cal.App.4th at p. 1055 [reversing denial of motion to quash where evidence submitted by  
7 plaintiff failed to support assertions of defendant’s presence and activities in California and where  
8 “declarations lack foundation, contain conclusory and vague statements, and are inadequate to  
9 support the legal and factual conclusions for which they are offered”]; *Inselberg v. Inselberg* (1976)  
10 56 Cal.App.3d 484, 489 [same]; *F. Hoffman-La Roche, supra*, 130 Cal.App.4th at p. 802.)<sup>6</sup>

11 **B. NWS Has Not Purposefully Availed Itself of Conducting Activities Within**  
12 **California, Nor Purposefully Directed Its Out-of-State Activities at**  
13 **California or its Residents.**

14 The first prong of the minimum contacts inquiry is refined into two sub-elements which query  
15 whether the Defendant has either (1) “purposefully availed” itself of the privilege of conducting  
16 activities in the forum, or (2) “purposefully directed” its activities toward the forum. (*Id.*) In short,  
17 “availment and direction, are, in fact, two distinct concepts.” (*Schwarzenegger v. Fred Martin Co.*  
18 (9th Cir. 2004) 374 F.3d 797, 802.) Thus, in order to satisfy the first element of the test, Plaintiff is  
19 required to show that NWS either purposefully availed itself of the privilege of conducting activities  
20 in California; or that NWS purposefully directed its activities towards California.<sup>7</sup> (*Id.* at p. 1155.)

21 <sup>6</sup> Plaintiff blithely ignores NWS’s opening and reply briefs by stating “NWS’s only argument as to why its sales to Big  
22 Sandy, Black, Huber, etc. do not count as contacts in California is that California law does not apply on Indian  
23 reservations.” (Supp. Opp. at p. 5, lines 1-3.) However, contrary to Plaintiff’s assertions, and as is obvious from the filed  
24 briefs and from the Court’s questions, the actual basis of NWS’ argument is that the jurisdictional facts do not  
25 demonstrate minimum contacts under the appropriate analysis outlined by the United States Supreme Court for  
26 determining specific personal jurisdiction.

27 <sup>7</sup> Plaintiff relies heavily on the “stream of commerce theory” to support its argument, however, “[t]he placement of  
28 product into the stream of commerce, without more, is not an act purposefully directed toward a forum state.” (*Holland  
America Line Inc. v. Wärtsilä North America, Inc.* (9th Cir. 2007) 485 F.3d 450, 459, citing *Asahi Metal Indus. Co. v.  
Super. Ct.* (1987) 480 U.S. 102, 112.) “Even a defendant’s awareness that the stream of commerce may or will sweep the  
product into the forum state does not convert the mere act of placing the product into the stream of commerce into an act  
purposefully directed toward the forum state.” (*Id.*; see also *Felix v. Bomoro Kommanditgesellschaft* (1988) 196  
Cal.App.3d 106, 114-115 [“we are of the opinion that the strictures of the due process clause forbid a court from  
exercising personal jurisdiction over a foreign corporation that merely places its products into the stream of commerce

1 In short, where the defendant has not conducted activities in the forum state, Plaintiff must  
2 prove that the defendant "(1) committed an intentional act, which was (2) expressly aimed at the  
3 forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is  
4 likely to be suffered in the forum state." (*Caddy, supra*, 453 F.3d at p. 1156; *Healthmarkets, Inc.,*  
5 *supra*, 171 Cal.App.4th at p. 1173.)

6 **1. Courts Have Concluded That the Minimum Contacts Analysis Required**  
7 **by the Due Process Clause Applies to Tribal Lands.**

8 In *Pennoyer v. Neff* (1878) 95 U.S. 714, the United States Supreme Court declared that a  
9 Court which entered a judgment without personal jurisdiction violated the Due Process Clause of the  
10 Fourteenth Amendment. (*Id.* at p. 732.) "Beginning with *Pennoyer*, the high court has 'relied on the  
11 principles traditionally followed by American courts in marking out the territorial limits of each  
12 State's authority.'" (*Boaz v. Boyle & Co., Inc.* (1995) 40 Cal.App.4th 700, 715, quoting *Burnham v.*  
13 *Super. Ct.* (1990) 495 U.S. 604, 609 [emphasis added].) "Although the minimum contacts test  
14 established by *International Shoe* is itself a fairness inquiry, the scope of that inquiry necessarily  
15 acknowledges that the constitutionality of a state's assertion of in personam jurisdiction reflects  
16 territorial limitations on the power of an individual state." (*Max Daetwyler Corp. v. R. Meyer* (3d  
17 Cir. 1985) 762 F.2d 290, 264; see also *Johnson Creative Arts, Inc. v. Wool Masters, Inc.* (1st Cir.  
18 1984) 743 F.2d 947, 950, n. 3.) One of those historical and statutory territorial limitations on State  
19 power is its inability to extend its civil regulatory and adjudicatory jurisdiction on to Indian  
20 reservations. (*Dist. Cty. Ct. for the Tenth Judicial Dist. v. Feather* (1975) 420 U.S. 425, 428, fn. 2.)<sup>8</sup>

21 "The limitation on state power in Indian country stems from the Indian commerce clause,  
22 which vests exclusive legislative authority over Indian affairs in the federal government." (Nell  
23 Jessup Newton, et al., *Cohen's Handbook of Federal Indian Law*, at p. 520, § 6.03[1][a]; see also  
24 *Alaska v. Native Village of Venetie* (1998) 522 U.S. 520, 527, n. 1 ["Generally speaking, primary

25 even though it may foresee that those products will ultimately wind their way into the forum state"].) Instead, "something  
26 more" than the mere placement of a product into the stream of commerce is required. (*Id.*) "[S]omething more is what the  
Supreme Court described as 'express aiming' at the forum state." (*Caddy, supra*, 453 F.3d at p. 1156.)

27 <sup>8</sup> The federal statutory definition of "Indian Country" includes land "within" a state. (18 U.S.C., § 1151.)

1 jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe  
2 inhabiting it, and not with the States”]; *Worcester v. Georgia* (1832) 31 U.S. 515, 561 “[t]he  
3 Cherokee nation, then, is a distinct community occupying its own territory, without boundaries  
4 accurately described, in which the laws of Georgia can have no force”].) Accordingly, any activities  
5 which are conducted by individuals or entities exclusively on Tribal lands cannot be said to have  
6 benefited or purposefully availed themselves of the protection of California. Contrary to the premise  
7 of Plaintiff’s entire argument, the United States Supreme Court has stated that it has “never accepted  
8 the proposition that state lines are irrelevant for jurisdictional purposes. . .”<sup>9</sup> (*Boaz v. Boyle & Co.,*  
9 *Inc.* (1995) 40 Cal.App.4th 700, 720, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980) 444  
10 U.S. 286, 291; see also *Hanson v. Denckla* (1958) 337 U.S. 235, 251 [minimum contacts analysis is  
11 “a consequence of territorial limitations on the power of the respective States”].) These limitations  
12 based on “state lines” are equally applicable to Tribal lands.

13 In accord with these general principles, the United States Supreme Court and other federal  
14 courts have repeatedly held that the “states possess limited power to assert jurisdiction on Indian land  
15 and to tax and regulate Indian affairs.” (*American Vantage Companies, Inc. v. Table Mountain*  
16 *Rancheria* (2002) 292 F.3d 1091, 1096, see, e.g., *Williams v. Lee* (1959) 358 U.S. 217, 223 [state  
17 courts have no jurisdiction over a claim by a non-Indian against an Indian]; *Oklahoma Tax Comm’n*  
18 *v. Chickasaw Nation* (1995) 515 U.S. 450, 458; *County of Yakima v. Confederated Tribes and Bands*  
19 *of the Yakima Indian Nations* (1992) 502 U.S. 251, 270 [county could not enforce its excise tax on  
20 sales of reservation land]; *McLanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 179-181; *New*  
21 *Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 343-344 [state may not regulate hunting and  
22 fishing by non-Indians on reservation]; *California v. Cabazon Band of Mission Indians* (1987) 480

23  
24 <sup>9</sup> Although the premise of the Supreme Court’s statement turns on interstate federalism concerns, an analogous concept  
25 applies here, since the sovereignty interests of a Tribal entity are also implicated by a State Court’s attempt to extend its  
26 jurisdictional reach over persons and entities located on Tribal lands. Plaintiff has conceded this point in its brief. (Supp.  
27 Opp. at p. 4 [“The People do not contend, and have no reason to contend, that a reservation is the same as any other place  
28 in California”].) Indeed, these principles distinguish the instant motion from Plaintiff’s arguments and supporting cases,  
since at issue in this motion is whether this Court has power over NWS itself, not whether it has power to hear the type of  
case brought by Plaintiff, an inquiry that is better left to a further proceeding addressing whether this Court has subject  
matter jurisdiction over NWS. Plaintiff relies almost exclusively on Court decisions discussing subject matter jurisdiction  
in the context of Indian affairs, which involves an entirely distinct analysis and which has not been put at issue by NWS  
in the instant motion.



1 U.S. 202, 221-222 [California could not regulate gaming activity by tribes on reservation lands];  
2 *Santa Rosa Band of Indians v. Kings Cty.* (9th Cir. 1975) 532 F.2d 655, 659 ["We think it  
3 unquestionable that the history of congressional dealings with the Indian trust lands is more than  
4 adequate to evidence an intent to oust state regulation over the same lands"].) Furthermore, the  
5 United States Supreme Court has concluded that general principles governing due process in the  
6 context of whether a State court has personal jurisdiction over individuals applies on Tribal lands.  
7 (*Harkness v. Hyde* (1878) 98 U.S. 476, 478 [concluding that the principles of *Pennoyer v. Neff* apply  
8 on Tribal lands].)

9 These territorial limitations on State power vis-à-vis Tribal lands are similarly reflected in the  
10 case law concerning whether a State court has personal jurisdiction over entities and individuals and  
11 their activities which take place exclusively on Tribal lands. In sum, activities occurring only on  
12 tribal lands do constitute minimum contacts with California for purposes of acquiring personal  
13 jurisdiction over a non-resident entity, without satisfying the minimum contacts test required by the  
14 Due Process clause of the federal Constitution.

15 **2. NWS Did Not Purposefully Direct Its Activities Toward California or its**  
16 **Residents By Transporting Goods Through California to a Tribal Entity**  
17 **and Indian-Owned Retailers on Tribal Lands.**

18 As with its argument relating to Tribal lands, Plaintiff's brief fails to address the transport  
19 inquiry raised by the Court, and instead begins with the presumption that destination on Tribal lands  
20 is irrelevant. As explained above, and as is apparent from the Court's posed question concerning the  
21 issue, such a destination is key to the proper answer. Based on this presumption, Plaintiff has  
22 conceded that transportation across California is insufficient to support minimum contacts should this  
23 Court conclude that contact with Tribal lands are not minimum contacts with California for purposes  
24 of the due process inquiry. (Supp. Opp. at p. 6, lines 2-8 ["Mere transportation of goods through  
25 California in connection with commission of an offense in another state (*or on a reservation* to the  
26 extent that reservation may be considered like another state . . .) may not be sufficient contact with  
27 California to support California's jurisdiction over the transporter . . .].) However, even without this  
28

1 presumption, NWS' mere transportation of products through California at the purchaser's request and  
2 direction is simply insufficient to permit this court to exercise specific personal jurisdiction over  
3 NWS, even if the goods were destined for a California location, which they were not. As Plaintiff  
4 has offered no other evidence of any other contact with California other than this, such transportation  
5 does not satisfy minimum contacts analysis.  
6

7 For example, in *Verosol B.V. v. Hunter Douglas, Inc.* (E.D. Va. 1992) 806 F.Supp. 582,  
8 plaintiff asserted that "based on the volume of goods that [defendant] ships into this State,  
9 [defendant] is doing or transacting business in Virginia . . . and is subject to this court's jurisdiction  
10 on that basis." (*Id.* At p. 590.) Plaintiff sought to support its argument by preparing a summary of  
11 defendant's "invoices showing substantial shipments . . . into Virginia." (*Id.*) "According to these  
12 summaries, between January 1989 and May 1992, [defendant] shipped into Virginia 37,800 products  
13 worth more than \$2,286,700." (*Id.*) In addition, Plaintiff claimed "based on an affidavit prepared by  
14 a legal assistant employed by plaintiffs' counsel, that four Virginia retailers who carry [defendant's]  
15 products received sample books from [defendant]." (*Id.*) On these facts, the district court concluded  
16 that "[t]he mere fact that a defendant ships products into a state is, of course, not alone sufficient to  
17 establish that the defendant is doing or transacting business in the state." (*Id.* at p. 591.)  
18

19 A number of courts have come to the same conclusion where a plaintiff asserts that the mere  
20 shipment of goods across a forum state, without more, constitutes minimum contacts sufficient to  
21 support a court's exercise of specific personal jurisdiction over the defendant. (*See, e.g., Fed. Ins.*  
22 *Co. v. Lake Shore, Inc.* (4th Cir. 1989) 886 F.2d 654, 658 [products shipped to residents F.O.B.  
23 Michigan do not represent 'significant activities' within the state"]; *Charia v. Cigarette Racing Team,*  
24 *Inc.* (5th Cir. 1978) 583 F.2d 184, 188-189 [concluding that F.O.B. shipment, without more, is not  
25 purposeful availment of the laws of the forum state]; *Bhandari v. Mehta* (N.D. Cal. Nov. 25, 2003)  
26 No. C02-2813 SI, 2003 WL 22846224, at \*2 [no purposeful availment and defendant's "knowledge  
27  
28

1 that the goods would transit through California” does not change result]; *Hanes Companies, Inc. v.*  
2 *Contractor’s Source, Inc.* (M.D.N.C. Oct. 6, 2008) No. 1:08CV334, 2008 WL 4533989, at \*12 [“the  
3 mere fact that a distributor’s goods may have passed through the forum state is an insufficient basis to  
4 assert personal jurisdiction over the eventual recipients of those goods”]; *Eagle Paper Int’l, Inc. v.*  
5 *Expolink, Ltd.* (E.D. Va. Jan. 17, 2008) Civil Action No. 2:07cv160, 2008 WL 170506, at \*5, fn. 3;  
6 *Cree, Inc. v. Bridgelux* (M.D.N.C. July 5, 2007) No. 1:06CV00761, 2007 WL 3010532, at \*5  
7 [“Supreme court decisions had not yet established a stream of commerce theory to the breadth that  
8 mere presence of one’s products in a state would subject a person to the jurisdiction of that forum”].)

9  
10 Another distinguishing factor which differentiates the instant case from every decision that  
11 Plaintiff relies on is the fact that NWS does not decide the destination of the cigarettes that are  
12 shipped. Indeed, the purchasing tribal entity has sole discretion to determine where the cigarettes are  
13 shipped and subsequently sold after title and risk transfer F.O.B. on the Cattaraugus Indian reservation  
14 in New York. Indeed, NWS only ships to destinations selected by its direct purchaser, in this case,  
15 the Big Sandy Rancheria. A number of cases have held that this lack of control over the destination  
16 of shipment is dispositive of the issue of specific personal jurisdiction as lacking.

17  
18 In *Lesnick v. Hollingsworth & Vose Co.* (4th Cir. 1994) 35 F.3d 939, plaintiff asserted that the  
19 district court had specific personal jurisdiction over a cigarette filter manufacturer by virtue of the  
20 sale of cigarettes in the forum state containing its filters. (*Id.* at p. 940.) The defendant manufacturer  
21 “acknowledged that, when it sold the material for cigarette filters to Lorillard, it placed the material  
22 in commerce knowing that it would eventually be sold in [the forum] as a component of . . .  
23 cigarettes.”<sup>10</sup> (*Id.*) During the relevant time period, the defendant provided the cigarette

24  
25  
26 <sup>10</sup> The fact that the manufacturer distributed a component part, rather than a final product, is immaterial “because there  
27 simply is no *per se* constitutionally significant difference between component parts and finished products.” (*Jeffers v.*  
28 *Wal-Mart Stores, Inc.* (S.D.W.Va. 2001) 152 F.Supp.2d 913, 921 [adding that “[i]t would be unwise for any court to  
conclude that, *without more*, the Due Process clause of the Fourteenth Amendment compels a finding that a plastic bottle  
is somehow constitutionally different from its cap or label”].)

1 manufacturer with 10 billion filters which were marketed and distributed through the nation. (*Id.*)  
2 The jurisdictional facts also showed that the defendant and cigarette manufacturer had entered into an  
3 agreement which required close cooperation to produce the cigarettes and required sharing in  
4 royalties from product development. (*Id.* at 946.)

5  
6 On these jurisdictional facts, plaintiff argued that the cigarette manufacturer's act of shipping  
7 cigarettes into the forum state should be imputed to the defendant. (*Id.*) The court concluded that  
8 this was insufficient to demonstrate minimum contacts with the forum State since "[a]ll of the listed  
9 contacts between [the cigarette manufacturer] and [defendant] relate only to [defendant's] agreement  
10 to supply filters from its plant to" out of state facilities and "none of the conduct is anyway directed  
11 toward the state of Maryland." (*Id.* [emphasis in original]; see also *Cree, Inc.*, *supra*, 2007 WL  
12 3010532, at \*5; *Jeffers*, *supra*, 152 F.Supp.2d at p. 921 [holding that fact that defendant entity knew  
13 an intermediate entity would purchase its product and ship it into the forum state "alone is too  
14 attenuated to meet the requirements of purposeful availment"]; *Static Control Components, Inc. v.*  
15 *Lexmark Int'l, Inc.*, No. Civ.A. 04-84-KSF, 2005 WL 2009273, at \*7; *Lansing Trade Group, LLC v.*  
16 *3B Biofuels* (S.D. Tex. April 27, 2009) ---F.Supp.2d---, Civil Action No. H-08-3155, 2009 WL  
17 1140458, at \*13 [no purposeful availment where purchaser unilaterally decided where defendant  
18 shipped the products from the forum state].)

19  
20  
21 Similarly, NWS sells its cigarettes FOB Seneca Cattaraugus Indian Territory. NWS has no  
22 control over the destination of the cigarettes. NWS does not solicit business in California or  
23 otherwise target California as a destination of its cigarettes; the cigarettes sold in California, if any, is  
24 a result of unilateral acts of independent third parties of which NWS has no control over and does not  
25 decide whether cigarettes will be sold to consumers. Moreover the cigarettes sold by NWS only pass  
26 through California. NWS does not advertise in California, does not maintain offices in California,  
27 nor has it engaged in any contractual obligations relating whatsoever to California. In sum, NWS'

1 shipment of cigarettes to tribal entities on Tribal lands do not constitute purposeful availment.  
2 (Montour Decl. at ¶¶ 1-7.)

3       Instead of addressing the issue posited by the Court, the State also claims that mere transport  
4 in itself is the illegal act under the directory statute, and therefore there is *per se* specific personal  
5 jurisdiction over NWS.<sup>11</sup> The directory statute provides that transporting cigarettes that a person  
6 “knows or should know” will be sold in violation of the directory statute is prohibited. California  
7 Revenue and Taxation Code Section 30165.1(e)(3)(A). However, a requisite violation of the act is  
8 required for this section to operate. Selling, possessing or offering to sell cigarettes in California not  
9 on the directory does constitute a violation of the directory statute. California Revenue and Taxation  
10 Code Section 30165.1(e)(2). However, all evidence offered by Plaintiff show that all sales occur on  
11 Tribal lands, and as such, the cause of action cannot factually arise out of mere shipment through  
12 California.<sup>12</sup>

13  
14       In addition, even if shipment constitutes a violation of the Act, does not mean that, *a fortiori*,  
15 specific personal jurisdiction exists because NWS shipped cigarettes. Indeed, this faulty line of  
16 reasoning has been rejected by the Ninth Circuit, since it unduly attempts relax the requirements of  
17 due process and minimum contacts analysis. In *Glencore Grain Rotterdam B.V. v. Shivnath Rai*  
18 *Harnarian Co.*, 284 F.3d 1114, 1124-25 (9th Cir. 2002), Plaintiff argued that an international  
19 convention did not require a finding of personal jurisdiction, and therefore, the Court should conclude  
20

21  
22 <sup>11</sup> Plaintiff’s argument on this point—mere transport is the prohibited act—fails to address any other cause of action besides  
23 that based upon the directory statute. Plaintiff has, therefore, conceded the “relatedness” requirement of the minimum  
24 contacts analysis for its other three asserted causes of action. *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557  
25 F.2d 1280, 1289, n.8 (9th Cir. 1977) (Personal jurisdiction must be established for each cause of action.) Thus, even if  
26 the Court accepts Plaintiff’s argument on this point with respect to the directory statute, only the Plaintiff’s first cause of  
27 action can survive. The other three causes of action must be dismissed, as Plaintiff has not met its proof by  
28 preponderance of the evidence that the “relatedness” requirement is satisfied by waiving any argument on this point.

<sup>12</sup> The *Coleville* and *Moe* cases do not help the State on this issue. The sine qua non of the rulings in both of those cases  
was the fact that the state was asserting a valid tax over non-Indians. *Coleville*, 447 U.S. at 151 *Moe*, 425 U.S. at 483.  
The legal burden of the tax fell on the non-Indian. Because the state could validly assert the tax, it could impose  
“minimal” obligations upon reservation retailers to collect the tax. In this case, the regulatory burden of the directory  
statute falls directly upon the seller, *i.e.*, the reservation retailer. Thus, this case is not controlled by the *Moe* or *Coleville*  
rulings.

1 that it was not barred to hear the action. (*Id.* at p. 1121.) In rejecting this argument, the Court stated,  
2 “It is a bedrock principle of civil procedure and constitutional law that a statute cannot grant personal  
3 jurisdiction where the Constitution forbids it.” (*Id.* [citations omitted].) Here, Plaintiff is arguing that  
4 the Court has personal jurisdiction because transport across California is a violation of the statute, in  
5 an apparent attempt to read the requirements of due process and minimum contacts out of existence.<sup>13</sup>  
6 Unfortunately for Plaintiff, California cannot pass statutes that grant jurisdiction forbidden by the  
7 Constitution, therefore, this Court should reject Plaintiff’s argument and hold that specific personal  
8 jurisdiction over NWS does not exist in this case for the reasons outlined in this brief.  
9

10 In sum, the transportation of goods through the State of California is not sufficient to establish  
11 minimum contacts, even though the ultimate destination of the goods is a tribal reservation, because  
12 Tribal lands are not a part of California for analytical purpose of the minimum contacts inquiry.  
13 Additionally, mere shipment through California does not demonstrate purposeful availment,  
14 especially were third parties are directing the destination.

15 **3. NWS Did Not Purposefully Direct Its Activities Toward, or Conduct**  
16 **Activities in California By Virtue of a Tribal Entity’s Redistribution of its**  
17 **Goods to Indian-Owned Retailers for Sale to California Residents**  
**Exclusively on Tribal Lands.**

18 For example, in *North Pacific Ins. Co. v. Switzler* (Or.App. 1996) 924 P.2d 839 the Plaintiff  
19 argued that a State court could properly assert personal jurisdiction over a non-Indian whom had  
20 traveled through the state and was involved in an accident on the reservation. (*Id.* at p. 846.) In  
21 analyzing this assertion, the Court initially noted that, “[a]lthough their reservation is within the  
22 exterior boundaries of Oregon, it is not fully part of the state.” (*Id.* [emphasis in original].) The  
23 Court then conducted a minimum contacts analysis and concluded that the trial court lacked personal  
24 jurisdiction over the non-Indian because “passing through the state on his way to visit Warm Springs  
25

26 <sup>13</sup> Plaintiff’s argument would result in personal jurisdiction being extended to factual situations where the Constitution  
27 and due process forbids it. For example, if NWS transported cigarettes from Oregon through California, and then sold  
28 them to a purchaser in Arizona and was aware that the purchaser would then resell them in California, personal  
jurisdiction and a violation of the statute would arguably exist. However, this would read the “purposeful direction” and  
“express aiming” requirements out of minimum contacts analysis, and the Court should not countenance such a result.

1 does not constitute a 'purposeful direction' of his activities at Oregon residents." (*Id.* at p. 848.) The  
2 court concluded that since all activities giving rise to the claim occurred outside of Oregon on an  
3 Indian reservation, that there were no cognizable minimum contacts to support specific personal  
4 jurisdiction over the non-Indian.<sup>14</sup> (*Id.*)

5 This conclusion is not surprising given that a number of courts have held that contacts and  
6 activities occurring exclusively within Tribal land boundaries do not constitute contact with the State  
7 in which those lands are situated for purpose of analyzing issues of personal jurisdiction and  
8 conducting a minimum contacts analysis. (*See, e.g., In re Commitment of Beaulieu III* (Minn.App.  
9 2007) 737 N.W.2d 231, 235-235; *Flammond v. Flammond* (Mont. 1980) 621 P.2d 471, 473; *Martinez*  
10 *v. Super. Ct.* (Ariz.App. 1987) 731 P.2d 1244, 1246 [same]; *Dixon v. Picopa Constr. Co.* (Ariz. 1989)  
11 772 P.2d 1104, 1113; *see also Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988); *Balyeat Law*  
12 *(Mont. 1998) P.C. v. Pettit*, 967 P.2d 398 (Mont. 1998); *Cook v. AVI Casino Enterprises, Inc.*  
13 *(Ariz.App. 2008) 2008 WL 4108121 [unpublished].*)<sup>15</sup>

14 The Ninth Circuit has also distinguished between contacts with Tribal lands and contacts  
15 with a State for jurisdictional purposes. In *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719  
16 F.2d 979 (9th Cir. 1983), in deciding that jurisdiction was lacking the Court determined that there  
17 were no "substantial activities giving rise to a dispute arising outside the reservation," therefore, the  
18 "significant contacts" test is not met here. (*Id.* at p. 985; *see also Hedreen v. Crow Tribal Housing*  
19 *Authority*, 521 F.Supp. 599, 606, fn. 4 (D. Mont. 1981); *In re Bertelson* (Mont. 1980) 617 P.2d 121,  
20

21 <sup>14</sup> This decision defeats the whole premise of Plaintiff's argument that "no case or rationale . . . supports the view that  
22 contacts with . . . an Indian reservation by a non-member . . . are not forum contacts with California. . .," since that is  
23 exactly what the *Switzler* Court held--that a non-Indian's activities on an Indian reservation do not constitute contacts  
with the State. Presumably, Plaintiff has decided to entirely ignore this decision in making its unsupported assertions  
rather than coming to grips with the reality of the Court's holding.

24 <sup>15</sup> In addition, a ruling by this Court that an Indian reservation is part of a state for the purpose analyzing personal  
25 jurisdiction issues would eviscerate decisions holding that a Tribal court's personal jurisdiction over non-Indians located  
26 off the reservation is limited by minimum contacts with the reservation, and would constitute a clear intrusion on Tribal  
sovereignty and jurisdiction. (*See, e.g., In re J.D.M.C.* (S.D. 2007) 739 N.W.2d 796, 809-810 ["whether tribal courts  
27 have personal jurisdiction is analyzed using the minimum contacts standard expressed in *International Shoe v.*  
*Washington* (1945) 326 U.S. 310"]; *State v. Jealous of Him* (S.D. 2001) 627 N.W.2d 790, 793 ["When one party becomes  
28 domiciled off the reservation, state and tribal courts enjoy concurrent jurisdiction, and the case may be adjudicated by  
whichever court first obtains personal jurisdiction"] [emphasis added]; *In re Defender* (S.D. 1989) 435 N.W.2d 717, 720-  
721.)

1 125.) Accordingly, NWS' commercial activities on, and other contacts with Tribal lands should not  
2 be considered for purposes of analyzing whether this Court has specific personal jurisdiction in this  
3 matter. Courts have come to this conclusion in analogous situations involving federal entities.

4 In *As You Sow v. Crawford Laboratories, Inc.* (1996) 50 Cal.App.4th 1859, the plaintiff  
5 asserted that personal jurisdiction existed over a defendant manufacturer because it shipped goods to  
6 a federal entity located in California. (*Id.* at p. 1868.) The jurisdictional facts showed that the  
7 manufacturer had shipped 77,149 product units to the federal entity over the course of four years  
8 yielding more than \$6,343,700. (*Id.*) "All negotiations, communications, billing, and payments  
9 occurred with a federal entity outside of California." (*Id.*) Evidence also demonstrated that the  
10 manufacturer paid shipping costs, maintained risk of loss, and retained legal title until the goods  
11 arrived, although independent shipping companies carried the products to the federal entity in accord  
12 with the federal entity's directions. (*Id.* at p. 1865.) In evaluating jurisdiction, the Court stated, "We  
13 find the sales to [the federal entity] provided an insufficient connection between California and [the  
14 manufacturer]," notwithstanding the enormous quantity of goods shipped in California to the federal  
15 entity. (*Id.* at p. 1869.) On that basis, the Court did not consider those contacts when evaluating the  
16 issue of specific personal jurisdiction.<sup>16</sup> It is NWS' position that a similar rule should prevail in this  
17 case.

18  
19 **a. Plaintiff Cannot Prove That Minimum Contacts Exist By**  
20 **Asserting That NWS Knew, or Should Have Known Its**  
21 **Conduct Limited Exclusively to Tribal Lands Would Have**  
22 **Effects in California.**

23 There is no question that "most courts agree that merely asserting that a defendant knew or  
24 should have known that his intentional acts would cause harm in the forum state is not enough to  
25 establish jurisdiction under the effects test." (*Pavlovich, supra*, 29 Cal.4th at p. 271; *see also IMO*

26 <sup>16</sup> The court concluded that specific personal jurisdiction existed in *As You Sow* because the manufacturer had made 16  
27 direct sales to private distributors, other than the federal entity, which were located in California. Here, unlike the  
28 manufacturer in *As You Sow*, NWS has not made any direct sales of cigarettes anywhere in California, and like the Court  
in that case, this Court should conclude that contacts with Tribal entities or Indian-owned retailers on Tribal lands, like  
contacts with federal entities, does not constitute minimum contacts for purposes of determining whether specific  
personal jurisdiction exists in this matter.



1 *Industries, Inc. v. Kiekert AG* (3d Cir. 1998) 155 F.3d 254, 265 ["we . . . agree with the conclusion  
2 reached by the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits that jurisdiction under *Calder*  
3 requires more than a finding that the harm caused by the defendant's tort is primarily felt within the  
4 forum"].) Accordingly, as discussed below, evidence submitted by Plaintiff demonstrating that NWS  
5 merely knew or should have known that its conduct limited to Tribal lands would have effect, or that  
6 such effects were foreseeable in California are insufficient as a matter of law to satisfy the effects test  
7 as enunciated by California and federal courts.

8 **b. Plaintiff Must Prove That NWS Expressly Aimed or Targeted**  
9 **Its Conduct At California.**

10 "[I]n order to establish personal jurisdiction over [a] nonresident defendant the plaintiff must  
11 proffer 'evidence of express aiming or intentional targeting.'" (*Shisler, supra*, 146 Cal.App.4th at p.  
12 1260.) Accordingly, "placing a product in the stream of commerce, may be felt nationwide but  
13 without more it is not an act *purposefully directed* toward the forum state." (*Id.*) Where there is no  
14 evidence that a defendant has specifically targeted California residents, defendant's conduct outside  
15 the forum "alone is insufficient to establish personal jurisdiction." (*Id.*)

16 For example, in *Felix v. Kommanditgesellschaft* (1988) 196 Cal.App.3d 106, the defendant,  
17 an automobile parts manufacturer shipped its parts to Volkswagen who subsequently included those  
18 parts in vehicles that it sold in California. (*Id.* at p. 116.) The jurisdictional facts demonstrated that  
19 the defendant was incorporated in a foreign country, and had not "done business in California at any  
20 [relevant] time, [had] no office, affiliate, subsidiary, agent, employee, bank accounts, or business  
21 operations in this state." (*Id.*) The court noted that the parts and vehicles themselves were  
22 manufactured outside California. (*Id.*) There was also evidence before the court that defendant knew  
23 that its products were sold in California and that its products were being "currently be[ing] purchased  
24 by consumers through authorized Volkswagen dealership." (*Id.*)

25 Given these facts, the court held "that a foreign corporation must *knowingly* avail itself of the  
26 benefits accruing from its activities within the forum before jurisdiction will attach." (*Id.* at p. 676.)  
27 The Court also stated evidence demonstrating this included "an intent or purpose to serve the market  
28 in the forum State, establishing channels for providing regular advice to customers in the forum State,

1 or marketing the product through a distributor who has agreed to serve as the sales agent in the forum  
2 State.” (*Id.* at p. 676.) After applying the foregoing principles to the facts, the court concluded that  
3 “[t]he appropriate test is not knowledge or awareness or the ultimate destination of the product, but  
4 whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to  
5 be haled there” and that “[t]he contacts in this case are simply too fortuitous and and tenuous to  
6 warrant the exercise of personal jurisdiction” over defendant. (*Id.*; see also, e.g., *Carretti v. Italpast*  
7 (2002) 101 Cal.App.4th 1236, 1251 [no specific personal jurisdiction where there was not direct sales  
8 to California users]; *Shisler, supra*, 146 Cal.App.4th at p. 1261 [no specific personal jurisdiction  
9 where there was no evidence that defendant had “specifically targeted California residents”].)

10 Here, like the defendant in *Felix*, even if NWS was aware that its cigarettes were being sold to  
11 California consumers on Tribal lands, Plaintiffs have submitted no evidence to show that NWS  
12 expressly targeted or aimed its conduct at California by, for example, setting up distribution  
13 networks, marketing in the forum, or making direct sales to entities or consumers in California.  
14 Indeed, all of Plaintiff’s evidence is to the contrary—NWS expressly aimed and targeted its conduct  
15 to tribal entities situated outside of California on Tribal lands. Furthermore, Plaintiff has submitted  
16 no evidence to show that NWS had any intent or design to serve California consumers, other than  
17 evidence establishing that retailers, not NWS, sold their products to California residents. This is  
18 simply not enough to meet the minimum contacts test, or to show express aiming or intentional  
19 targeting.

20 Plaintiff relies on the Court’s decision in *Bridgestone v. Super. Ct.* (2002) 99 Cal.App.4th  
21 767, to argue that this Court has specific personal jurisdiction over NWS. However, that case is  
22 distinguishable for several reasons.<sup>17</sup> First, and foremost, the reasoning adopted by the Court is

23  
24 <sup>17</sup> All of Plaintiff’s cited cases are distinguishable from the instant action on the ground that the manufacturers and  
25 distributors specifically targeted the forum state by expressly making decisions concerning where their products would be  
26 distributed, shipped, marketed, and sold, or that the Court applied a standard that has been rejected by the Ninth Circuit  
27 and California Supreme Court. (See, e.g., *A. Uberti & C. v. Leonardo* (Ariz. 1995) 892 P.2d 1354 [marketing activities  
28 demonstrated that manufacturer intended to serve forum market]; *Duple Motor Bodies, Ltd. v. Hollingsworth* (9th Cir.  
1969) 417 F.2d 231 [manufacturer specifically made design modifications for specific forum market]; *Barone v. Rich*  
*Bros. Interstate Display Fireworks Co.* (8th Cir. 1994) 25 F.3d 610 [applying impermissible “knew or should have  
known” standard of purposeful availment]; *Vermeulen v. Renault, U.S.A. Inc.* (11th Cir. 1983) 985 F.2d 1534  
[manufacturer designed product for forum market, advertised in forum, controlled distribution network, and controlled  
retailers of products]; *Plant Food Co-Op v. Wolfkill Feed & Fertilizer Corp.* (9th Cir. 1980) 633 F.2d 155 [applying

1 inconsistent with a decision subsequently handed down by the California Supreme Court later that  
2 year entitled *Pavlovich v. Super. Ct.* (2002) 29 Cal.4th 262, in which the Court expressly decided that  
3 “virtually every jurisdiction has held that the *Calder* effects test requires intentional conduct  
4 expressly aimed at or targeting the forum state in addition to the defendant’s knowledge that his  
5 intentional conduct would cause harm in the forum”).<sup>18</sup> Because *Bridgestone* relied on contrary  
6 reasoning in using “commercial actuality” and “awareness of sales” tests to decide specific personal  
7 jurisdiction, that portion of the decision is no longer controlling. (See, *Bridgestone, supra*, 99  
8 Cal.App.4th at p. 777.) In addition, there was no question that, unlike the instant action, Defendants  
9 intended to serve the market in California since “Bridgestone’s representatives visited Firestone’s  
10 distribution center in Ontario” thereby indicating purposeful direction of activities at California. (*Id.*)  
11 There is no such evidence in the instant matter.<sup>19</sup>

12 **c. NWS Did Not Expressly Aim Or Intentionally Target**  
13 **California Consumers Even Though Its Product May Have**  
14 **Been Sold by Third-Party Retailers to Such Consumers.**

15 “knew or should have known” standard of purposeful availment, now rejected by the Ninth Circuit in *Caddy*, and the  
16 California Supreme Court in *Pavlovich*]; *Benitez-Allende v. Alcan Alumino Do Brasil, S.A.* (1st Cir. 1988) 857 F.2d 26  
17 [citing direct marketing effort into forum state].)

18 <sup>18</sup> In meeting this “intentional targeting/express aiming” requirement, Plaintiff is required to submit additional evidence  
19 demonstrating that showing that NWS had more than mere knowledge that cigarettes would be purchased by California  
20 consumers, and must submit “additional evidence of express aiming or intentional targeting” of those consumers.  
21 (*Pavlovich, supra*, 29 Cal.4th at p. 273.) Indeed, the California Supreme Court has concluded that knowledge that harm  
22 might be suffered in California “alone is insufficient to establish express aiming at the forum state as required by the  
23 effects test.” (*Id.* at p. 278.) Plaintiff has submitted no additional evidence beyond that proving mere knowledge.

24 <sup>19</sup> Throughout its brief, Plaintiff repeatedly makes assertions in support of its argument that personal jurisdiction exists  
25 over NWS for reasons that the California Supreme Court and Ninth Circuit have determined are insufficient to confer  
26 such jurisdiction. (See, e.g., Supp. Opp. at p. 7, lines 7-10 [“NWS knew or should have known . . . that those cigarettes  
27 were distributed beyond the reservation”] [emphasis added]; Supp. Opp. at p. 7, lines 10-11 [“NWS knows that Big Sandy  
28 distributes its cigarettes to other California entities”] [emphasis in original]; Supp. Opp. at p. 10, lines 17-24 [“exercise of  
jurisdiction is permissible where . . . defendant ‘knows or should reasonably anticipate that [its product] ultimately will  
be resold in California’”]; Supp. Opp. at p. 11, lines 15-17 [“NWS expected, knew, or should have known that cigarettes  
sold to Big Sandy were being resold in California”] [emphasis added]; Supp. Opp. at p. 12, lines 9-10 [“it had to know  
that its cigarettes sold and shipped to Big Sandy were ending up in the hands of California consumers”] [emphasis  
added].) The California Supreme Court has expressly rejected Plaintiff’s “knew or should have known,” standard,  
thereby undermining the heart of Plaintiff’s legal arguments. (See *Pavlovich, supra*, 29 Cal.App.4th at p. 273 [“most  
courts agree that merely asserting that a defendant knew or should have known that his intentional acts would cause harm  
in the forum state is not enough to establish jurisdiction under the effects test” and “we . . . join with those jurisdictions  
that require additional evidence of express aiming or intentional targeting. In doing so, we are in accord with those  
California decisions applying the effects test”].) It is telling that in citing those California decisions that supported its  
conclusion, the California Supreme Court did not cite to the *Bridgestone* opinion, even though it had been decided only a  
few months prior. Therefore, this Court should reject Plaintiff’s framework of analysis since it is contrary to controlling  
California precedent and the vast weight of precedent.

1  
2 The California Supreme Court has expressly determined that a defendant may not be haled  
3 into a jurisdiction by virtue of the "unilateral activity of another party or a third person." (*Pavlovich*,  
4 *supra*, 29 Cal.4th at p. 269.) "[T]he fact that a defendant's actions in some way set into motion  
5 events which ultimately injured a California resident cannot, by itself, confer jurisdiction over that  
6 defendant." (*Id.*, at p. 276, quoting *Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 547;  
7 *Asahi Metal Industry Co. v. Super. Ct.* (1987) 480 U.S. 102, 112 [the mere awareness that third  
8 parties will sweep the defendant's product into the forum state does not convert its act of selling the  
9 product to third parties "into an act purposefully directed toward the forum State"].)

10 Additionally, in *Elkman v. Nat'l States Ins. Co.* (Cal.App. 2009) No. B205919, ---  
11 Cal.Rptr.3d---, 2009 WL 1333935, an out-of-state insurance company located in Missouri issued an  
12 insurance policy to plaintiff, who at the time of issuance, resided in Florida. (*Elkman, supra*, 2009  
13 WL 1333935, at \*1.) Thereafter, plaintiff relocated to California and made a claim for benefits under  
14 the policy while residing there. (*Id.*) The insurance company paid benefits to the insured under the  
15 policy pursuant to its contractual obligations to plaintiff and later determined that she was ineligible  
16 for further benefits. (*Id.*) Plaintiff sued the insurance company to enforce its contractual obligations  
17 under the policy. The record also showed that the insurance company accepted premiums and paid  
18 benefits to several hundred other insureds located in California prior to the Plaintiff bringing her  
19 lawsuit. (*Id.* at \*7.)

20 Plaintiff argued that based on the foregoing jurisdictional facts, the Court had specific  
21 personal jurisdiction over the out-of-state insurance company. (*Id.* at \*10.) The Court rejected these  
22 arguments and stated as follows:

23 [W]e conclude that [the insurance company] did not subject itself to specific  
24 jurisdiction in California merely by accepting premium payments from California and  
25 by processing and paying claims submitted by its insureds for services rendered in this  
26 state. [The insurance company] did not "come here" voluntarily, *no matter how many*  
27 *insureds did*. It was the unilateral decision of [Plaintiff] and other insureds to relocate  
28 to California which caused [the insurance company] to accept payments from this state  
and to process claims for services rendered in this state. These circumstances do not  
support a finding [that the insurance company] purposefully availed itself of forum  
benefits so as to make it subject to specific jurisdiction in California. (*Elkman, supra*,  
2009 WL 1333935, at \*10 [emphasis added].)

1  
2 Here, like the insurance company in *Elkman*, NWS specifically limited its business  
3 transaction to entities located on Tribal lands. NWS cannot be held to have purposefully availed  
4 itself of conducting or directing its activities at California by virtue of the fact that California  
5 residents have directed their activities at Tribal lands by buying cigarettes from entities other than  
6 NWS, and then transporting them into California. A major distinction between the cases cited by  
7 Plaintiffs and the factual circumstances in this case is that the ultimate activity discussed therein was  
8 conducted in the forum State and targeted at forum State residents, whereas here the activity at issue  
9 was specifically conducted outside the forum state, on tribal lands, and at entities which are residents  
10 of another forum. Any contact with residents of California was a result of California residents  
11 leaving California to purchase the goods from other third-party entities, not NWS, which are located  
12 on Tribal lands. In short, NWS "did not come voluntarily" to California "no matter how many"  
13 California residents purchased cigarettes from third-party entities on Tribal lands and it cannot be  
14 held to have purposefully availed itself or directed its activities at California, since all of those  
15 activities were directed at the Tribal forum, and entities and residents located there.<sup>20</sup>

16 In conclusion, the fact that the tribal entity that purchases goods from a non-resident entity  
17 and redistributes those goods to California residents is not sufficient to support a finding of minimum  
18 contacts for the purpose of acquiring jurisdiction over that non-resident entity, where the non-resident  
19 has not expressly aimed or targeted those residents, and those residents or other third-parties have  
20 unilaterally acted to create contacts with California.

21 **4. As Plaintiff Concedes, Public Law 280 Is Irrelevant to Whether This**  
22 **Court Has Personal Jurisdiction In This Matter, and Even if it Does**  
23 **Apply, Plaintiff is Barred From Enforcing Its Civil Regulatory Laws on**  
24 **the Reservation.**<sup>21</sup>

25 <sup>20</sup> Indeed, the insurance company had far more extensive contacts with California residents than NWS has in the instant  
26 case, since the insurance company maintained an ongoing commercial relationship with insureds in-state by performing  
27 its obligations under the policy in California. Here, it is undisputed that NWS has no relationship with any California  
28 resident that purchase cigarettes, and has only established commercial relationships with tribal entities and Indian-owned  
entities located exclusively on Tribal lands.

<sup>21</sup> Plaintiff's argument concerning the application of Public Law 280 to the instant matter is truly bizarre in that it  
proceeds from the premise that "[t]his case is not about Pub. L. 280, and the People do not contend that PL 280 directly  
confers either subject matter or personal jurisdiction over NWS," but then inconsistently cites to this statute to argue that  
this Court should not take into account cases that expressly analyze minimum contacts and personal jurisdiction on Tribal

1  
2 Plaintiff's reliance on 28 U.S.C. § 1360, P.L. 83-280, 67 Stat. 588 ("PL 280") is hopelessly  
3 incorrect and highlights the improper focus of Plaintiff's argument concerning whether this Court has  
4 personal jurisdiction over NWS. Public law 280 is a narrow grant of subject matter jurisdiction to  
5 allow state courts to hear certain civil causes of action between private litigants, on Indian lands, and  
6 does not address issues of personal jurisdiction. Indeed, Plaintiff admits that it does not apply to this  
7 action. (Supp. Opp. at p. 3.) Additionally, Plaintiff wildly exaggerates the scope of subject matter  
8 jurisdiction granted to it by PL 280, since controlling authority precludes such jurisdiction over  
9 Plaintiff's causes of action. Therefore, this Court should reject Plaintiff's argument that PL 280  
10 grants this Court personal jurisdiction over this action.  
11

12 PL 280 was enacted to address the lack of appropriate tribal forums to settle *private legal*  
13 *disputes* between reservation Indians and other persons with whom reservation Indians may have  
14 dealings.<sup>22</sup> (*Bryan v. Itasca County Minnesota* (1976) 426 U.S. 373, 383 (1976); *California v.*  
15 *Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 208.) The type of "civil laws" that apply on  
16 Tribal lands pursuant to PL 280 are limited to causes of action such as contract and tort. (*Bryan*, 436  
17 U.S. at p. 385, fn.10.) More importantly, the grant of "civil" jurisdiction to a state court is  
18 "applicable only as it may be relevant to private litigation." (*Cabazon, supra*, 480 U.S. at p. 208.)  
19  
20

21 lands. (See People's Supplemental Opposition to Native Whoelsale's Motion to Quash Service of Summons, at p. 3, lines  
22 17-19, *cf.* p. 4, lines 23-26 ["NWS's citation to *North Pacific Ins. Co. v. Switzler* (1996) 143 Or.App. 223, is inapposite  
23 for the same reason, because the reservation has been expressly exempted from the reach of PL 280, unlike any of the  
24 reservations at issue here"].) As explained below, Public Law 280 is irrelevant to issues of personal jurisdiction on the  
25 reservation in the context of this case, and to the extent that it is ambiguous as to whether it applies or not, that ambiguity  
26 should be resolved in favor of NWS, since its position is consistent with less State regulation of Tribal lands and  
27 minimizes intrusions on Tribal sovereignty and jurisdiction. (*Santa Rosa Band of Indians, supra*, 532 F.2d at p. 660  
28 [applying Indian canon of construction "that ambiguities in Federal treaties or statutes dealing with Indians must be  
resolved favorably to the Indians" to Public Law 280].)

<sup>22</sup> The express language of Public Law 280 states that it applies to disputes to "between Indians, or to which Indians are party." This express limitation on the reach of the statute means that it does not apply to this action since no Indians are parties to the instant litigation. The only parties in this litigation are a State government, and an Indian-owned corporation, as Plaintiff readily concedes. (Supp. Opp. at p. 13, lines 8-10 ["Moreover, a corporation, even one wholly owned by members of the tribe on whose reservation it sits, is not a tribal member *or Indian itself*"] [emphasis added].)

1 PL 280 simply does not permit Plaintiff to obtain personal or subject matter jurisdiction on Tribal  
2 lands for enforcement of civil regulatory statutes, such as those forming the basis of the causes of  
3 action in this case. In short, "if the *state law generally permits the conduct at issue, subject to*  
4 *regulation*, it must be classified a civil/regulatory and *Public L. 280 does not authorize its*  
5 *enforcement on an Indian reservation.*" (*Cabazon, supra*, 480 U.S. at p. 209 [emphasis added].)  
6  
7 There is no question that the shipment and sale of cigarettes in California is permitted, subject to  
8 regulation.

9 **5. The Case Law Relied On By Plaintiff Is Distinguishable Because it Relates**  
10 **to Issues of Subject Matter Jurisdiction, and Do Not Discuss Issues of**  
11 **Minimum Contacts or Personal Jurisdiction.**

12 In response to the foregoing line of authorities, Plaintiff does not cite a single case which  
13 stands for the proposition that a State court may transcend the territorial limitations on its power  
14 imposed by the due process clause and the territorial boundaries of the reservation by extending  
15 personal jurisdiction on to Tribal lands. Instead, Plaintiff haplessly relies on an irrelevant line of  
16 cases which are readily distinguishable by virtue of their discussion of issues of subject matter  
17 jurisdiction, which is not before this Court in the instant motion.

18 For example, in *Chemehuevi Indian Tribe v. California State Board of Equalization*, 800 F.2d  
19 1446 (9th Cir. 1986), the Ninth Circuit did not address the issue of personal jurisdiction and merely  
20 held that California need not treat a Tribe as a sister state with respect to an interstate tax compact.  
21 There the Court held that California need not treat the tribe as it does a sister state in regard to an  
22 interstate tax compact. *Rosalie Acosta v. County Of San Diego*, 126 Cal.App.2d 455, 272 P.2d 92  
23 (Cal.App. 1954) does not address personal jurisdiction, and merely holds that a tribal member is a  
24 citizen of a state for welfare benefit purposes.

25 *Nevada v. Hicks*, 533 U.S. 353 (2001) also does not discuss issues of persona jurisdiction, and  
26 therefore, the statement made by the Court that Tribal lands are a part of a territory of a state is  
27 limited to the facts before the Court. Significantly, the Court concluded that process extended onto  
28

1 Tribal lands because the defendant had engaged in off-reservation activity in violation of California's  
2 criminal statutes, a violation which is clearly within PL 280's grant of *criminal* jurisdiction. Thus,  
3 *Hicks* fails to support the State's position that it this Court may exercise personal jurisdiction over  
4 NWS in a *civil* action.

5  
6 Each of the other cases cited by Plaintiff relate to actions brought by a tribe or Indian  
7 aggrieved by a State's attempts to regulate reservation activity. (*Washington v. Confederated Tribes*  
8 *of the Coleville Indian Reservation* (1979) 447 U.S. 134 [suit by tribe against state seeking to enjoin  
9 state from seizing cigarette shipments to reservation]; *Moe v. Confederated Salish and Kootenai*  
10 *Tribes of the Flathead Reservation* (1976) 425 U.S. 463 [Indian smoke shop owner brought  
11 declaratory action against state to prevent collection of state cigarettes taxes]; *New Mexico v.*  
12 *Mescalero Apache Tribe* (1983) 462 U.S. 324 [tribe brought action to enjoin state from enforcing  
13 state game laws on tribal land].) None of these cases involved claims of personal jurisdiction,  
14 accordingly, they should not be considered as determinative of the personal jurisdiction issued  
15 currently pending before this Court.  
16

17 **B. Plaintiff's Asserted Causes of Action Do Not Arise Out of Sales of**  
18 **Cigarettes on Tribal Lands California.**

19 Plaintiff's asserted causes of action do not arise from NWS's activities on tribal lands. "In  
20 ascertaining the existence of specific jurisdiction, '[this Court must] consider only those 'forum-  
21 related activities as they relate to the specific cause of action.'" (*Jewish Defense Org., supra*, 72  
22 Cal.App.4th at p. 1058, *quoting Gordy v. Daily News, L.P.* (9th Cir. 1996) 95 F.3d 829, 835.) "To  
23 prevail, [plaintiff] must establish the causes of action arose out of an *act committed or transaction*  
24 *consummated in California . . .*" (*Mansour v. Super. Ct.* (1995) 38 Cal.App.4th 1750, 1758-1759  
25 [emphasis added].) Where the activity giving rise to minimum contacts occurred outside the forum  
26 state, and that activity forms the basis of Plaintiff's claim, the relationship between that claim and the  
27 forum is missing as a matter of law. (*See Holland America Line Inc. v. Wärtsilä* (9th Cir. 2007) 485  
28



1 F.3d 450, 460-461.) Accordingly, Plaintiff must prove that each cause of action independently  
2 satisfies the minimum contacts "relatedness" requirement. (See *Helicopteros Nacionales de*  
3 *Columbia, S.A. v. Hall* (1984) 466 U.S. 408, 415; *Sonora Diamond Corp.*, *supra*, 83 Cal.App.4th at  
4 p. 536 [same].)

5 **1. Plaintiff's First Cause of Action Does Not Arise Out of, or Relate to Sales**  
6 **of Cigarettes on Tribal Lands.**

7 In *Boaz v. Boyle & Co., Inc.* (1995) 40 Cal.App.4th 700, the Court considered whether a cause  
8 of action related to the defendant's activities in California in the context of a mass tort litigation. In  
9 that case, plaintiff asserted that the Court had personal jurisdiction over the defendant manufacturer  
10 for its actions in producing a drug ingested by plaintiff's grandmothers which resulted in injuries to  
11 plaintiff, one of which was born and resided in California. (*Id.* at pp. 717-721.) The jurisdictional  
12 facts showed the following: (1) all instances of ingestion of the drug took place in New York; (2) 9%  
13 of the defendant manufacturer's sales of the drug were made to California physicians during the  
14 relevant time period; (3) the defendant manufacturer targeted its advertising and marketing activities  
15 at California physicians; and (4) a single plaintiff in the action was a California resident whose  
16 grandmother had ingested the drug which led to her injuries. (*Id.*) On these facts, the Court held that  
17 the trial court lacked specific personal jurisdiction over defendant, stating:

18 It is conceded that none of [plaintiff's] grandmothers, who ingested DES, did so in  
19 California. Nor did any of them acquire the product as the result of any of [the  
20 defendant manufacturer's] activities related to California. Indeed, as we have seen,  
21 none of them except [one plaintiff] has any connection with this state. [That plaintiff]  
22 was born here and is a resident of California. But it is conceded that any [drug]-  
23 related affliction she suffers has nothing to do with any of [defendant manufacturer's]  
24 activities related to California. (*Id.* at p. 717-718.)

25 As in *Boaz*, the Plaintiff has conceded that all activities, except for the act of shipping  
26 through California, giving rise to this litigation took place on Tribal lands, outside of California.<sup>23</sup>  
27 The jurisdictional facts in this case show: (1) NWS sold cigarettes exclusively to a Tribal entity  
28 located on Tribal lands; (2) NWS shipped cigarettes exclusively to that Tribal entity, per the Tribal  
entity's directions; (3) there is no evidence in the record showing that NWS marketed or advertised to

<sup>23</sup> NWS has previously addressed why the transitory act of shipping does not qualify as minimum contacts.

1 any California residents, other than Tribal entities and Indian-owned retailers located on Tribal lands;  
2 and (4) no direct sales were made to any California resident. Plaintiff has also conceded these facts  
3 as well. When comparing these facts to *Boaz*, it is clear that the first cause of action does not arise  
4 out of NWS's activities in California, since the directory statute requires that a sale take place in  
5 California in order for it to apply. Plaintiff has conceded that no such sales take place by agreeing  
6 that all relevant contacts were exclusively with Tribal lands, and therefore, the first cause of action  
7 lacks a substantial nexus with NWS' limited activities in the State of California. (See *Glencore*  
8 *Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.* (9th Cir. 2002) 284 F.3d 1114, 1123  
9 [concluding that "claim does not arise out of conduct directed or at or related to California" where  
10 companies involved were all out-of-state and required delivery of goods in a foreign location, even  
11 where numerous shipments were made from California ports].)

12 **2. Plaintiff Has Conceded That Its Second Through Fourth Causes of Action**  
13 **Do Not Arise Out of, or Relate to Sales of Cigarettes on Tribal Lands.**

14 Plaintiff has offered no substantive argument as to why its second through fourth claims arise  
15 out of NWS's activities on Tribal lands by limiting its brief to the discussion of the directory statute,  
16 and therefore has waived it. On that basis alone, this Court should grant NWS's motion to quash and  
17 dismiss the second through fourth causes of action. However, these causes of action also do not arise  
18 out of NWS' activities in California, since each of the statutes upon which they are based require a  
19 sale in California, and NWS has only made sales on Tribal lands.<sup>24</sup> Accordingly, NWS' motion to  
20 quash should be granted for the separate and independent reason that Plaintiff's causes of action do  
21 not arise out of NWS' forum contacts.

22 **III. PLAINTIFF'S EVIDENCE DOES NOT SUPPORT THE ASSERTIONS FOR**  
23 **WHICH IT IS OFFERED.**

24 A number of assertions made in Plaintiff's brief simply are not supported by any evidence in  
25 the record.<sup>25</sup> For example, Plaintiff's attorneys have made the following contentions without

26 <sup>24</sup> NWS incorporates by reference the arguments made in its reply brief as to why Plaintiff's causes of action do not arise  
27 out of NWS' contacts with California.

28 <sup>25</sup> NWS has also filed evidentiary objections to Plaintiff's evidence submitted in support of its supplemental opposition  
concurrently with the instant brief. NWS respectfully requests that this Court rule on those objections. The discussion in

1 providing a shred of evidentiary support: (1) NWS uses a California tribe as a middleman to  
2 distribute illegal cigarettes to the California public in general; (2) NWS is guilty of violating Revenue  
3 and Taxation Code section 30165.1, subdivision (e)(3)(B); and (3) NWS knows the cigarettes which  
4 are the subject of this action are being distributed in violation of law; (4) "NWS alone, not the  
5 California buyer (Big Sandy), nor the California recipients (Big Sandy, Black Hawk Tobacco, Huber  
6 and Native Made), directed all releases from the FTZ" (Supp. Opp. at pp. 6, lines 19-26 to 7, lines 1-  
7 2.); and (5) that cigarettes sold by the various retailers to Plaintiff's various declarants were actually  
8 the same cigarettes that Native Wholesale shipped to the Big Sandy Rancheria and other locations.  
9 NWS respectfully requests that this Court not consider these points in making its ruling, since there is  
10 no evidence in the record to support them, and the burden is on Plaintiff to establish by  
11 preponderance of the evidence that these facts exist.

12 **IV. CONCLUSION**

13 Personal jurisdiction attaches at the point where all elements of the minimum contacts test are  
14 satisfied. Accordingly, personal jurisdiction cannot attach to NWS upon shipment of goods through  
15 the State of California, upon delivery of goods to a tribal entity located on tribal lands, or upon  
16 redistribution of those goods to California residents, because at each point, not all elements of the test  
17 are satisfied. For all of the foregoing reasons, and the reasons laid out in NWS's other supporting  
18 papers, this Court should grant NWS's motion to quash and dismiss this action in its entirety with  
19 prejudice.

20 Respectfully submitted,

21 Dated: June 3, 2009

**FREDERICKS PEEBLES & MORGAN LLP**

22  
23 By: 

24 John M. Peebles  
25 Attorneys for Defendant  
26 NATIVE WHOLESALE SUPPLY  
COMPANY

27 this portion of the brief is limited to pointing out to the Court where Plaintiff has offered no evidence at all to support its  
28 assertions.

OCT 13 2009

J. DAVID NAVARRO, Clerk  
By P. BOURNE  
DEPUTY

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

BRETT T. DeLANGE (ISB No. 3628)  
Deputy Attorney General  
Consumer Protection Division  
Office of the Attorney General  
954 W. Jefferson, St., Second Floor  
P. O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2424

Attorneys for the State of Idaho

THEODORE V. SPANGLER, JR., (ISB No. 1318)  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Boulevard  
P.O. Box 36  
Boise, Idaho 83722-0150  
Telephone: (208) 334-7530  
Facsimile: (208) 334-7844

Attorneys for the Idaho State Tax Commission

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General, and the IDAHO STATE TAX  
COMMISSION,

Plaintiffs,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation, and Does 1  
through 20,

Defendant.

)  
)  
) Case No. CV OC 0815228  
)  
) PLAINTIFFS STATE OF IDAHO AND  
) THE IDAHO STATE TAX  
) COMMISSION'S SECOND  
) SUPPLEMENTAL MEMORANDUM IN  
) OPPOSITION TO DEFENDANT'S  
) MOTION TO DISMISS  
)  
)  
)  
)



ORIGINAL 000639

## **INTRODUCTION**

By order dated September 15, 2009, this Court has asked for supplemental briefing concerning the holding of a California trial court to the effect that that court could not exercise *in personam* jurisdiction over Native Wholesale Supply Company (Native Wholesale), because the sale of the cigarettes in question terminates on an Indian reservation, albeit located in California. On several independent grounds the California court's analysis is faulty.

*First*, the California court confused and conflated federal preemption principles related to Indian law with the power of a court to hear a matter, consistent with due process, over an out-of-state defendant.

*Second*, the California court improperly allowed Native Wholesale to assert as its own the Indian law rights of the California tribe receiving the cigarettes. This should not be allowed for two reasons here. First, the facts are different. Warpath, Inc., the recipient in Idaho of Native Wholesale's illegal cigarette sales and shipments, is not a tribe or tribal member but, instead, is a state-law created corporation. It simply does not have the same Indian law rights that a federally recognized tribe like the Big Sandy Tribe in California has and which the California court allowed Native Wholesale to assert there. Second, in any event, Warpath is not a defendant or otherwise alleged to have committed any violation of Idaho law. Further, despite opportunity and capability to appear in this case, Warpath has not sought to intervene. Principles of standing prohibit allowing Native Wholesale to assert here, as a third party, whatever rights Warpath has in order to exonerate Native Wholesale from liability for its violations of Idaho law.

*Third*, the California court's conclusion that due process does not allow it to exercise *in personam* jurisdiction is supported by neither United States nor Idaho Supreme Court precedent.

*Fourth*, the California court's conclusion that the Commerce Clause and Indian Commerce Clause do not allow California to stop Native Wholesale's illegal cigarette sales finds no support in United States Supreme Court precedent. On the contrary, overwhelming precedent recognizes a State's right to prevent an out-of-state defendant from evading restrictions on the marketing of cigarettes applicable to in-state vendors.

### **BACKGROUND**

The Court is familiar with the facts surrounding this matter: Native Wholesale is a corporation established pursuant to the Sac and Fox Tribe of Oklahoma's corporate code and has its principal place of business on the Seneca Reservation, located in New York. Affidavit of Arthur Montour in Support of Motion to Dismiss for Lack of Personal Jurisdiction (Montour Affidavit), p. 2, ¶ 2. Native Wholesale sells cigarettes to Warpath, Inc. Second Affidavit of Beth Kittelmann (Kittelmann Affidavit), p. 4, ¶ 9. Native Wholesale does this by first sending the cigarettes to the Las Vegas Foreign Trade Zone (FTZ), where they are stored. When Warpath wants cigarettes, it orders them from Native Wholesale, which instructs the FTZ to release the ordered cigarettes to a trucking company, such as Con-Way Freight, with whom Native Wholesale has contracted and paid to deliver the cigarettes to Warpath. *Id.* Warpath is located in Plummer, Idaho, and the store is within the boundaries of the Coeur d'Alene Reservation. Affidavit of Samuel A. Diddle in Support of Motion to Dismiss for Lack of Personal Jurisdiction And/Or Subject Matter Jurisdiction, p. 2, ¶ 3, Exhibit B. Warpath is not (and as a non-biological "person" could not be) a member of the Coeur d'Alene Tribe; it is an Idaho corporation. *Id.*, p. 2, ¶ 2, Exhibit A. Indeed, being incorporated in Idaho it is a resident of Idaho. *See Caremark Therapeutic Servs. v. Leavitt*, 405 F. Supp.2d 454, 458 (S.D.N.Y. 2006)

(traditional definition of residence for a corporation is the place of incorporation). Native Wholesale for the same reason is not a member of the Seneca Nation or the Coeur d'Alene Tribe.

The State of California has also brought suit against Native Wholesale for its allegedly illegal marketing of cigarettes there. The California trial court recently dismissed the complaint on three grounds:

- Because the cigarettes Native Wholesale has sold are to an Indian tribe and because under federal law tribes enjoy a level of sovereign immunity, insufficient contacts existed between California and Native Wholesale for *in personam* jurisdiction purposes. Minute Order, People v. Native Wholesale Supply Company, Case No. 34-2008-00014593-CU-CL-GDS, Superior Court, Sacramento County, (Minute Order), p. 4.

- The fact that Native Wholesale's cigarettes were resold in California was insufficient, under a stream of commerce theory, to justify the exercise of personal jurisdiction. Minute Order, pp. 4-5.

- The Interstate Commerce Clause and Indian Commerce Clause bar California from regulating Native Wholesale's cigarette sales into the State. Minute Order, p. 6.

Native Wholesale urges this Court to adopt the California court's reasoning and result and dismiss the State's action here. For the following reasons, the Court should reject Native Wholesale's invitation.

### **ARGUMENT**

#### **I. THE CALIFORNIA COURT IMPROPERLY CONFUSED FEDERAL PREEMPTION LAW WITH PERSONAL JURISDICTION ANALYSIS**

The California court began its personal jurisdiction analysis correctly by inquiring into whether California had enough minimum contacts with Native Wholesale to satisfy due process. Minute Order, pp. 2-4. The court declared that it did not have such contacts, stating that there

were no cases holding that “sales by an out-of-state corporation to an Indian tribe on a reservation located in this state constitutes minimum contacts with this state that will support personal jurisdiction over the out-of-state corporation.” Minute Order, p. 2. This is a red herring. That there are no such precise case holdings does not mean that such contacts do not count as contacts for due process purposes.

A. The California court relied upon two decisions, State v. Flammond, 621 P.2d 471 (Mont. 1980), and Martinez v. Superior Court, 731 P.2d 1244 (Ariz. Ct. App. 1987), for its "minimum contacts" determination. Neither case is apposite here. In Flammond, the court ruled that it had neither subject matter nor personal jurisdiction over a child support action against a father who is an enrolled member of the Blackfoot Tribe and who was residing on the Blackfoot Reservation. The father married the mother in California and the couple separated in California. Later the father moved back to the Blackfoot Reservation. *Id.* at 472. Two points about this case bear mentioning. First, finding that it did not have subject matter jurisdiction, the court's ruling on personal jurisdiction is *dicta*. Second, the facts surrounding this case are not close to that before this Court. Here, as discussed in the prior briefing, Native Wholesale does not reside on the Coeur d'Alene Reservation; it is not a member of the Coeur d'Alene Tribe; and it has significant, sizable, and purposeful contacts with Idaho by virtue of its selling, shipping and causing to be imported into Idaho millions of noncompliant cigarettes. In short, the facts of this case do not fit into Flammond's child support framework involving an action against a member of a tribe residing on his Tribe's reservation.

Martinez v. Superior Court, 731 P.2d 1244 (Ariz. Ct. App. 1987), closely parallels Flammond. A non-Indian wife filed for divorce in Arizona state court. The Indian husband objected. The court noted that the parties lived on the reservation of the tribe to which the



husband belonged, that the marriage occurred and fell apart on the reservation, that the children to the marriage were conceived on the reservation, and that the tribe had its own divorce code and tribal court to handle family-law matters. *Id* at 1246. The court thus ruled that under such circumstance it could not exercise personal jurisdiction over the Indian father. It is plain that Martinez's personal jurisdiction holding was predicated on Indian-law preemption principles, not Due Process Clause-based "minimum contacts" jurisprudence; it is no less plain that Martinez's facts are too far afield of the case to be instructive. The State is not suing *Warpath, Inc.* for selling non-compliant cigarettes on the Coeur d'Alene Reservation. Rather, it is suing *Native Wholesale* for selling, shipping, and causing to be imported into Idaho non-compliant cigarettes.

**B.** The California court further rejected the notion that Native Wholesale's sales to the Big Sandy Tribe constituted "minimum contacts," stating that "simply because Big Sandy is physically located in this state," this is not enough. Minute Order, p. 2. Being on a reservation, however, does not mean a person or business entity is not part of the State where the reservation is located. As the Ninth Circuit Court of Appeals observed with respect to a matter involving California—and a case overlooked by the California court: "The attributes of sovereignty possessed by [a] Tribe *do not negate the fact that [a] Reservation is a part of the State of California.*" Chemehuevi Indian Tribe v. California State Bd. of Equalization 800 F.2d 1446, 1450 (9th Cir. 1986) (emphasis added). By parity of logic, if a commercial enterprise conducts its operations on or sells its product to customers on an Indian reservation within Idaho, it is doing business in this State. *E.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188 (1989) ("[i]n this case, . . . all of Cotton's leases are located entirely within the borders of the State of New Mexico and also within the borders of the Jicarilla Apache Reservation"). As the United States Supreme Court later reiterated "[s]tate sovereignty does not end at a reservation's

border . . . . Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.” Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (citations omitted).<sup>1</sup>

The California court went astray because it confused the issue of whether adequate "minimum contacts" personal jurisdiction exist, a due process concern, with the issue of whether *subject-matter* jurisdiction may be exercised over a tribal member residing on the reservation set aside for the member's tribe—*i.e.*, whether the authority of state courts to adjudicate the involved controversy is preempted by applicable federal statutes or common law. *See, e.g., Fisher v. District Court*, 424 U.S. 382, 386 (1976) ("[i]n litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them'"); Williams v. Lee, 358 U.S. 217, 223 (1959) (allowing state court to exercise jurisdiction over debt action against two tribal members by reservation trader impermissible, since "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"). To be sure the California court is correct that ““tribal sovereignty [is] at its strongest when explicitly established by a treaty . . . or when tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe[.]” Minute Order, p. 3, *quoting San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007). But this substantive principle of Indian law says nothing about whether Native Wholesale's millions of dollars in commercial dealings with an Idaho corporation residing in Idaho constitute a sufficient basis for the exercise of *in personam* jurisdiction here.

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<sup>1</sup> While the California court cited to Hicks, it was for a different proposition and not related to the fact that Indian reservations are part of the territory of a State. The California court did not cite to Cotton Petroleum or Chemehuevi Indian Tribe.

C. Even as to substantive Indian law principles, the California court's analysis omitted key considerations. It has long been settled that "Indians going beyond reservation boundaries have generally been subject to non-discriminatory state laws otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Consequently, if one were to assume *arguendo* that Native Wholesale (a corporation chartered under an *Oklahoma* tribe's code) should be deemed a member of the Seneca Nation on whose *New York* reservation its headquarters are located, its actions in selling, shipping, and otherwise causing to be imported into Idaho non-compliant cigarettes would be subject to the relevant state tobacco legislation since no claim exists that these laws treat tribes or their members differently than similarly situated nonmembers. *E.g.*, Duro v. Reina, 495 U.S. 676, 686 (1990); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 161 (1980). The Maine Supreme Court in Department of Health and Human Services v. Maybee, 965 A.2d 55, 57 (Me. 2009), so reasoned in rejecting a tribal member vendor's preemption challenge without regard to the specific location within Maine to which the cigarettes were shipped ("[a]ctivity of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states") (citing Hicks, 533 U.S. at 362-66). Native Wholesale, in short, enjoys no special status merely because its principal place of business exists on the Seneca Nation's New York reservation; its Indian law-relevant status is the same as it would be if it were headquartered in Boise (or Plummer, Idaho for that matter), where it enjoys no special exemption from state law because it admittedly is not a member of the Coeur d'Alene Tribe.

The substantive Indian law-grounded preemption result here, however, would not change even were Mescalero Apache ignored. Application of the interest-balancing test articulated most definitively under White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), is addressed

in the State's earlier brief opposing the motion to dismiss on subject matter jurisdiction grounds at pages 13-15, and that analysis will not be repeated. Nevertheless, the bottom line is that upon balancing the relevant tribal, federal and state interests, this strongly supports allowing Idaho to require Native Wholesale's cigarette sales, shipments and importing of cigarettes into Idaho to comply with Idaho law.

**D.** A separate problem in the California decision was allowing Native Wholesale to assert the federal Indian law rights of the Big Sandy Tribe in the California litigation. Big Sandy's status as a federally recognized tribe was important to the California court: "Big Sandy is a sovereign Indian tribe. Activities involving a sovereign physically in California are not treated in the same manner as activities involving other entities located in California." Minute Order, p. 5. The California court did not explain the basis, however, for allowing Native Wholesale to set forth and rely upon the Big Sandy Tribe's status as a federally recognized tribe in order to exonerate itself from its illegal sales into California. Indeed, the California court erred in allowing Native Wholesale to do so.

Ordinarily, a plaintiff cannot maintain an action to redress injuries to others or to assert the rights of third persons. Tileston v. Ullman, 318 U.S. 44, 46, (1943). There is an exception to this rule, but only if three conditions are met: the litigant has suffered "injury in fact," plaintiff has a close relationship with the third party so as to have consistent interests, and it would be difficult or impossible for such parties to assert their rights themselves. Powers v. Ohio, 499 U.S. 400, 410-11 (1991). Focusing on the third condition here, there is nothing in the record to show that it would be impossible, let alone "difficult," for Warpath, Inc. to assert the Indian law rights Native Wholesale asserts here. Thus, third party standing is not available, and there is no basis for Native Wholesale to assert Warpath's rights here. *Accord* Kootenai Medical Center v.

Idaho Dep't of Health and Welfare, Nos. 34879, 34880 & 34881, 2009 WL 2581670, at \*6-\*7 (Idaho S. Ct. Sept. 24, 2009) (hospital lacks third-party standing to assert due process rights of Medicaid patients).<sup>2</sup>

## **II. THE CALIFORNIA COURT IMPROPERLY APPLIED STREAM OF COMMERCE PRECEDENT TO REJECT PERSONAL JURISDICTION**

Rejecting Native Wholesale's direct contacts with the Big Sandy Tribe, the California court stated that personal jurisdiction could nevertheless be exercised for cigarette sales ending up in California, pursuant to a stream of commerce analysis, but only if Native Wholesale exercised some control over the cigarette's ultimate destination. Minute Order,, p. 5, *citing* As You Sow v. Crawford Laboratories, Inc., 50 Cal. App. 4th 1859 (1996). The California court declared, however, that because Native Wholesale had stamped its cigarettes as "for reservation sale only," this was enough to exonerate it from Big Sandy's subsequent sales to California residents.

The California court's myopic factual focus should not be followed here. As noted in prior briefing, the undisputed facts are that before Native Wholesale sells the cigarettes to Warpath, Inc., it ships them to the FTZ in Nevada, and then after the cigarettes are sold to Warpath, they are shipped from Nevada to Idaho. And what also cannot be denied is that Native Wholesale controls the shipping of its cigarettes to Idaho. It is Native Wholesale, not Warpath, that notifies the FTZ when a sale has occurred and that certain brands and styles of cigarettes in

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<sup>2</sup> Even were Warpath, Inc. to intervene or appear, it could not assert the rights of a member of the Coeur d'Alene Tribe or of the Coeur d'Alene Tribe itself, because it is neither. The fact is that a corporation, even one owned by members of the tribe on whose reservation it sits, is not a tribal member or Indian itself. See Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003) (corporations have identities separate from that of their owners); Baraga Prods., Inc. v. Comm'r, 971 F. Supp. 294, 296 (W.D. Mich. 1977) *aff'd* 136 F.3d (6<sup>th</sup> Cir. 1998) (incorporated business entity not an enrolled member of an Indian tribe simply because its sole shareholder is); *id.*, at 298 ("a corporation is not an 'Indian' for purposes of immunity" from the application of state law).

certain quantities should be readied and released for shipment to Warpath.<sup>3</sup> The trucking companies' bills of lading list Native Wholesaler as the shipper and as the entity to be billed.<sup>4</sup> Not one shipment in its five-plus years of millions of cigarette sales to Idaho reflect any contact between Warpath and the Nevada FTZ or between Warpath and a trucking company, other than being listed as the purchaser and ultimate recipient of the cigarettes.

Native Wholesale, in other words, plays a central and directing function in controlling all aspects of the storage and shipment of its millions of cigarette into Idaho. And what is true is that that control and conduct are more than adequate evidence to establish that personal jurisdiction may be exercised. *E.g.*, Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992) (that a foreign corporation avails itself of “the benefits of an economic market in the forum State” is sufficient to establish personal jurisdiction “even if it has no physical presence in the State.”); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (due process is met where the defendant “purposefully directed” activities toward the forum state or intends to derive benefits from its markets); *id.* at 473-74 (“where individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities”) (emphasis added; citations omitted); Asahi Metal Indus. Co. Ltd. v. Superior Court, 480 U.S. 102, 112 (1987) (personal jurisdiction may be exercised over an out-of-state defendant where this action of the defendant purposefully directed toward the forum State); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (personal jurisdiction may be exercised in instances where the presence of the product at issue in the forum state was “not simply an isolated occurrence,” but arose from

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<sup>3</sup> 2nd Kittelmann Aff., pp. 4, 7, ¶¶9, 20.

<sup>4</sup> 2nd Kittelmann Aff., p. 7, ¶ 20. True and correct copies of several representative samples of Native Wholesale's post-August 2008 invoices/bills of lading which show it both as the “buyer” and seller of its cigarettes are attached to the 2nd Kittelmann Aff. as Exhibit I.

the defendant's intentional efforts "to service, directly or indirectly, the market for its product in [the forum state]"); Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 80, 803 P.2d 978, 986 (1990) (type of "minimum contact" relevant to due process analysis is "whether the defendant 'purposefully directed' its activities at residents of the forum and whether the litigation results from the alleged injuries that arose out of or relate to those activities").

In short, given Native Wholesale's direct sales and shipments of millions of illegal cigarettes to an Idaho resident and corporation in Idaho, there was no need for the California court (or this Court) to engage in a stream of commerce analysis. The fact is that stream of commerce analysis is utilized in cases where an out-of-state defendant sells its product to one or more intermediaries, who also may be located outside the forum State, and who ultimately sell or distribute defendant's product in the forum State. In such instances, courts may exercise *in personam* jurisdiction over such defendant where it is shown that it "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." World-Wide Volkswagen, 444 U.S. at 297-98. That is not the case here, where the evidence shows that Native Wholesale has directly sold its products over an extended time period to an Idaho resident for delivery with implicit recognition that the product could be, and would be, marketed at least in part to other Idaho residents.

The conclusion that Native Wholesale was or reasonably should have been aware that its cigarettes sales to Warpath, Inc. would have both on- and off-reservation effects in Idaho is compelled by the facts appearing in the record as they currently exist or are capable of judicial notice under I.R.E. 201 for purposes of resolving the present motion to dismiss. The 92 million-plus cigarettes sold to Warpath, Inc., constitute a staggering volume for a single retailer and plainly serve a market far larger than the on-reservation members of the Coeur d'Alene Tribe.

According to the 2000 Census, there are just over 1,325 American Indians living on the Coeur d'Alene Reservation.<sup>5</sup> The shipment of 92 million plus cigarettes to that reservation by Native Wholesale defies any suggestion that such a volume of cigarettes would be purchased exclusively by 1,325 consumers (and this assumes each and every Indian living on the Reservation is a smoking adult, which of course is not true) and Native Wholesale does not contend to the contrary. Clearly, large volumes of the cigarettes being sold to Warpath ultimately are being purchased by non-members of the Coeur d'Alene Tribe, resulting in large off-reservation effects. Native Wholesale knows or should know that these cigarettes are being sold and distributed to individuals other than Coeur d'Alene members residing on their Reservation.

Given the volume of cigarettes being sold, if personal jurisdiction exists over a Virginia manufacturer after plaintiff developed an infection in Idaho from an intrauterine device being inserted in California, *see Duignan v. A.H. Robins Co.*, 98 Idaho 134, 559 P.2d 750 (1977), or if personal jurisdiction exists over an out-of-state component manufacturer when an industrial boiler assembled out-of-state exploded, injuring an Idaho man, *see Doggett v. Electronics Corp. of America*, 93 Idaho 26, 454 P.2d 63 (1969), or if personal jurisdiction exists over a Pennsylvania manufacturer of airplane component parts distributed to a Kansas-based plane manufacturer, when plane crash occurred in Idaho, *see Nat'l Union Fire Ins. Co. v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096 (D. Idaho 2003), and if "jurisdiction may attach [to] an out-of-forum defendant [who] merely engages in conduct aimed at, and having effect in, the situs state," *see Ziegler v. Indian River County*, 64 F.3d 470, 473 (9<sup>th</sup> Cir. 1995), then personal

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<sup>5</sup> U.S. Census Bureau; Census 2000 Summary File 1 (SF1) 100-Percent Data, P9 Race; generated using American FactFinder; <http://factfinder.census.gov> (Aug. 11, 2008). This number, importantly, includes all persons self-identifying as American Indians and not just persons who are actual members of the Coeur d'Alene Tribe.



jurisdiction may be exercised instantly as a result of Native Wholesale's sale of 92 million noncompliant cigarettes over a *five-year* period to an Idaho corporation and its central role in ensuring delivery into this State from the Nevada FTZ for marketing to, *inter alia*, Idaho consumers.

### **III. THE CALIFORNIA COURT IMPROPERLY RULED THAT THE COMMERCE CLAUSE AND THE INDIAN COMMERCE CLAUSE PRECLUDE THE STATE FROM STOPPING NATIVE WHOLESALE'S ILLEGAL CIGARETTE SALES**

A. The Commerce Clause is not an impediment to the State applying its laws to Native Wholesale's illegal cigarette sales. Thus, while Native Wholesale has not raised this issue, because the California court did, the State will respond briefly. In short, while the Commerce Clause generally is invoked as authority for federal legislation, the so-called dormant Commerce Clause limits the States' ability to enact legislation that adversely affects interstate commerce. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) ("[T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well"). State legislation may violate the dormant Commerce Clause if it either: (1) facially discriminates in favor of intrastate interests or (2) although facially neutral, has the "practical effect" of directly controlling "commerce occurring wholly outside that State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989).

The Complementary Act and Idaho's tax laws grant no advantage to any intrastate seller and are completely neutral in their application. This is relevant because state regulation that is evenhanded passes constitutional muster even if it imposes an incidental burden on interstate commerce, unless it can be shown that the regulation's burden on interstate commerce is "clearly excessive" when compared to the regulation's local benefits. *Or. Waste Sys., Inc. v. Dep't of*

Env'tl Quality, 511 U.S. 93, 99 (1994); *see also* Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2<sup>nd</sup> Cir. 2004); Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2<sup>nd</sup> Cir. 2003).

Because the Complementary Act and Idaho's tax laws do not discriminate in favor of intrastate interests, the next step is to evaluate whether these laws have the "practical effect" of directly controlling "commerce occurring **wholly outside** the State's borders." Healy, 491 U.S. at 336 (emphasis added). It is important to note that an "effect" on extraterritorial commerce "does not rise to the level of a constitutionally impermissible act because it does not constitute the 'regulati[on of] commerce,' Healy 491 U.S. at 332, 'control [of] commerce,' *id.* at 336, 'projection of one state regulatory regime into the jurisdiction of another State,' *id.* at 337, or 'application of a state statute to [extraterritorial] commerce,' *id.* at 336, necessary to render a state statute invalid." Freedom Holdings, 357 F.3d at 220 (citations omitted). As noted by the Supreme Court, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." Osborn v. Ozlin, 310 U.S. 53, 62 (1940); *see also* Healy, 491 U.S. at 345 (Scalia, J., concurring in part and concurring in the judgment) (noting that "innumerable valid state laws affect pricing decisions in other States," and cautioning against allowing Commerce Clause jurisprudence to "degenerate into disputes over degree of economic effect").

The Complementary Act and Idaho's tax laws do not directly control commerce occurring **wholly outside** Idaho's border. The laws apply to and regulate only the sales of tobacco products that are purchased by and shipped to consumers (including retailers) in Idaho. In short, Healy's concerns are satisfied and the California court's conclusion that it could not address, consistent with the Commerce Clause, Native Wholesale's illegal cigarette sales is without basis.

B. The California court's statement that the Indian Commerce Clause also poses an impediment to state regulation is equally off-based. Applicable Supreme Court precedent does not support the California court's conclusion, advocated by Native Wholesale here. As the Court has explained, the "central function" of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, "is to provide Congress with plenary power to legislate in the field of Indian affairs." Cotton Petroleum, 490 U.S. at 192. There is nothing in the Indian Commerce Clause which operates to preempt or curtail state law claims akin to the negative or dormant function possessed by the Interstate Commerce Clause. Thus, in Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982), the Supreme Court rejected the United States' request to "rely on the dormant Indian Commerce Clause . . . to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue." *Id.* at 845. In the Court's view, "the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General" since, "[a]lthough clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue." *Id.* at 846; *accord* Cotton Petroleum, 490 U.S. at 192. Because the Indian Commerce Clause merely empowers Congress to act, it has no independently preemptive function such to support Native Wholesale's claim of preemption. *See also* Omaha Tribe v. Miller, 311 F. Supp. 2d 816, 822 (S.D. Iowa 2004); Ward v. New York, 291 F. Supp. 2d 188, 199 (W.D.N.Y. 2003). Preemption instead must derive from


application of congressional enactments or federal common law and as explained above and in prior briefing, federal law does not stand in the way of the State's efforts here to stop Native Wholesale's illegal cigarette sales and shipments into Idaho.

**CONCLUSION**


Based on the foregoing argument, the State and the Tax Commission respectfully request that this Court deny Native Wholesale's motion to dismiss on personal and subject matter jurisdiction grounds and grant the State and Tax Commission's motion for a preliminary injunction.

DATED this 13th day of October, 2009.

**LAWRENCE G. WASDEN  
IDAHO ATTORNEY GENERAL**

By   
**BRETT T. DELANGE**  
Deputy Attorney General  
Consumer Protection Division

**IDAHO STATE TAX COMMISSION**


By   
**THEODORE V. SPANGLER, JR**  
Deputy Attorney General  
State Tax Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 13<sup>th</sup> day of October, 2009, I caused to be served, by the method indicated below, a true and correct copy of the foregoing, addressed to the following:

Samuel A. Diddle  
Eberle, Berlin, Kading, Turnbow &  
McKlveen, Chartered  
1111 West Jefferson Street, Suite 530  
P.O. Box 1368  
Boise, ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile

  
BRETT T. DELANGE  
Deputy Attorney General

Samuel A. Diddle, ISB #4967  
EBERLE, BERLIN, KADING, TURNBOW  
& McKLVEEN, CHARTERED  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

Attorneys for Defendant Native Wholesale Supply Company

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 431

OCT 23 2009

J. DAVID NAVARRO, Clerk  
By P. BOURNE  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

**DEFENDANT'S RESPONSE TO  
PLAINTIFFS' SECOND  
SUPPLEMENTAL  
MEMORANDUM IN  
OPPOSITION TO  
DEFENDANT'S MOTION TO  
DISMISS**

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this Response to Plaintiffs' Second Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss.

ORIGINAL

In its Memorandum Decision and Order dated September 15, 2009, this Court allowed NWS to submit to the Court a decision from the Superior Court of California, County of Sacramento, which dealt with issues virtually identical to the present litigation. Plaintiff then was given two weeks to submit materials in response.

NWS submitted that California decision to the Court, along with a brief statement setting out the background of the California litigation. In response, Plaintiffs filed a seventeen (17) page "Second Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss," not simply dealing with the decision of California Court, but going far beyond in an attempt to take a third bite at the apple. NWS asserts that Plaintiffs' response was improper, as the Court did not invite another memorandum in opposition to the Motion to Dismiss, but only a limited response dealing with the California case. NWS requests the Court to strike Plaintiffs' Supplemental Memorandum.

If the Court wishes to receive additional legal arguments expanding upon the California decision, NWS respectfully submits the following:

As the Court will note, the California decision dealt with identical legal issues. The State attempted to impose cigarette regulations on NWS, a corporation chartered by a sovereign Indian Nation and wholly owned by a member of another federally recognized sovereign Indian nation. NWS had no physical presence in the State and simply sold cigarettes to a tribal entity which in turn sold those cigarettes on a reservation. The issue was whether the State had personal jurisdiction over NWS.

Plaintiffs in this case point out that in California the cigarettes were sold to an Indian tribe whereas in Idaho the cigarettes are sold by NWS to a corporation owned and operated by an enrolled member of a tribe. This is a distinction without a legal difference. That fact is borne out by the provisions of the Idaho Administrative Rules, IDAPA 35.01.10.014.01, which

**DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND SUPPLEMENTAL  
MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS -2**

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specifically provides that cigarette wholesalers may deliver cigarettes without Idaho stamps to Indian reservations when the purchaser is a business enterprise operated by the tribe or when the purchaser is a “business enterprise wholly owned and operated by an enrolled member or members of an Idaho Indian tribe.” Thus, the Idaho Administrative Rules, which control actions of the State and the State Tax Commission, recognize that there is no legal distinction.

The other factual statement that Plaintiffs make is that NWS somehow controls the “millions of cigarettes” it ships into Idaho. There is no proof of this in the record before this Court. The only proof is that NWS sells cigarettes to Warpath FOB Seneca Nation of Indians Territory basis. NWS does not sell cigarettes into the State of Idaho, but sells to Warpath which directs where the cigarettes are sold and to whom they are sold.

**I. The California Court Did Not “Confuse and Conflate” Federal Preemption Principles with Personal Jurisdiction Analysis.**

The California Court did not improperly confuse Federal preemption with personal jurisdiction. Rather, the Court conducted an analysis whether minimum contact existed to allow for personal jurisdiction. In order to conduct this analysis where the only contacts by NWS is with an Indian tribe or an entity wholly owned by an enrolled member of an Indian tribe on Indian lands, the Court had to look to issues of Federal preemption, involving the lack of authority by a state to regulate transactions with Indians on Indian lands. The Plaintiffs argue that it is a “red herring” that the California court found that there were no cases holding that “sales by an out-of-state corporation to an Indian tribe on a reservation located in this state constitutes minimum contacts with this state that will support personal jurisdiction over the out-of-state corporation.” This is not a red herring; it is a significant legal finding and supports the view that there are no minimum contacts justifying exercise of personal jurisdiction.



The Plaintiffs then try to downplay the significance of domestic relations cases relied on by the California court. Plaintiffs do this by either misrepresenting or misunderstanding the holdings of those cases. While the underlying subject matter deals with domestic relations, the decisions rest on issues of personal jurisdiction over tribal members residing on a reservation in a suit brought by an out-of-state non-tribal member. Those cases hold that the state cannot regulate tribal members on reservations and thus there is no personal jurisdiction. That is, activities taking place solely on Indian land do not constitute contacts with the forum state. The California court noted that those cases are relevant to rebut the State's assertion that NWS's sales to the California tribe constituted minimum contacts with the State simply because the tribe is physically located in the State. That is the same argument Plaintiffs are making in this case, and it must be rejected for the same reasons the California court specified in its Order.

What is confusing the issue is the Plaintiff's misstatement of the NWS transaction. The sale between NWS and Warpath does not involve Idaho residents, nor does it involve conduct occurring off the reservation in Idaho or indeed conduct occurring on the reservation in Idaho. Rather, there is an out-of-state sales transaction with shipment into the reservation. There is no NWS contact with Idaho as that sale does not involve Idaho residents. The Plaintiffs confuse the NWS sale FOB Seneca Nation to an entity wholly owned by an enrolled tribal member located in Idaho with sales within the state of Idaho. As the California court correctly concluded, no sales occurred in that state as a reservation itself is outside the regulatory jurisdiction of the state particularly where the conduct at issue only involves tribal members.

The Plaintiffs also suggest that because the California court did not consider the *Chemehuevi* case, *Chemehuevi v. California State Board of Equalization*, 800 F.2d 1446 (9<sup>th</sup> Cir 1986), its reasoning is unsound because that case is determinative. To the contrary, that case involved transactions on a reservation between members and non-members of a tribe. The Court

found that business was conducted in the State as the business customers were residents of the state when the conduct at the issue was between Indians and non-Indian state residents. That is not the situation here or nor was it the situation in California. *Chemehuevi* did not address Nation to Nation sales, and it was decided pre-*Cabazon*. The conduct at issue in California and in Idaho deals with Indian tribal entities on their reservations within the reservation boundaries where the state interest is minimal. State jurisdiction would infringe on the tribe's ability to regulate on reservation activities between Indians in this situation.

## **II. The California Court Properly Dealt with Stream of Commerce Doctrine.**

Just as in Idaho, California courts exercise long-arm jurisdiction over out-of-state defendants to the full extent allowed under the Fourteenth Amendment to the United States Constitution. Thus, the California court analyzed principles of personal jurisdiction under the Fourteenth Amendment. Those principles are founded on the concept that the defendant must have some level of "minimum contacts" with the forum state for the forum state's courts to assert jurisdiction over the defendant. *Asahi Metal Industry Co., Ltd v. Superior Court of California*, 480 U.S. 102, 109 (1987). The "minimum contacts" must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* In both California and Idaho, NWS did not avail itself of the privilege of conducting activities within the forum state, because it never had any dealings in or with the forum state. Instead, it sold cigarettes and sells cigarettes to a tribal entity FOB Seneca Nation and does not control where those cigarettes are retailed.

Plaintiffs also make an argument that the California court allowed NWS to "assert the Federal Indian law rights of the Big Sandy Tribe in the California litigation." This assertion is specious, as the California court simply realized that the tribal entity with which NWS did business enjoyed a special status under Federal law. NWS was not asserting the rights of a third

person; in California, as in Idaho, it was simply recognizing that the transaction at issue was an Indian-to-Indian transaction outside of the forum state.

What the California court recognized and what Plaintiffs attempt to sweep under the rug is that NWS did not transact business within the forum state, but rather sold its products FOB Seneca Nation. Moreover, what the California court recognized was that there were no in-state off-reservation acts involved, but only, at most, sales on the reservation that were not directed or controlled by NWS. Actions on a reservation by another party other than NWS cannot be in-state contacts which give state courts jurisdiction over NWS.

**III. The California Court did not Improperly Hold that the Commerce Clause in the Indian Commerce Clause Precluded the State from Regulating NWS.**

The California court analyzed the commerce clause properly. It recognized that the sales in which NWS was involved did not occur within the forum state, but rather outside of the state. Indeed, even assuming that the tribal entity accepts the NWS products on the reservation, those sales would occur on the reservation and involve only Indians. Therefore, the State has no regulatory authority and the State cannot exercise jurisdiction.

Most importantly, the Court recognized that the Commerce Clause does not allow the State to directly or indirectly control commerce occurring outside of the State's borders. This is exactly what California attempted to do and is what Idaho is attempting to do. Neither California nor Idaho can regulate sales of tobacco products outside of the state. If the tribal entity brings those products into the state and sells those products in violation of legitimate state law, then the state can exercise jurisdiction over the tribal entities, but it cannot exercise jurisdiction over NWS, which is not coming into the state and does not sell products within the state.

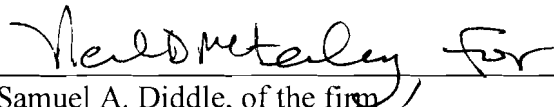
**IV. Conclusion.**

The California Court's decision is well-founded in law and policy. The Constitution and the Supreme Court of the United States set limits on the exercise of personal jurisdiction over out-of-state corporations. The circumstances in which the exercise of personal jurisdiction would be appropriate over such out-of-state corporations are simply not present in California or in Idaho regarding the sale by NWS of tobacco products to tribal entities.

Accordingly, NWS respectfully requests the Court to grant its motion to dismiss.

DATED this 23<sup>rd</sup> day of October, 2009.

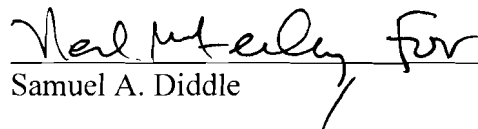
**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

By  for  
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 23<sup>rd</sup> day of October, 2009, as indicated below and addressed as follows:

Lawrence G. Wasden Attorney General State of Idaho Brett T. DeLange Deputy Attorney General Consumer Protection Division Office of the Attorney General Len B. Jordan Building 650 W. State Street, Lower Level PO Box 83702 Boise, Idaho 83702-0010	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Fax (208) 334-4151 <input type="checkbox"/> Electronic Court Transmission
Theodore V. Spangler, Jr. Deputy Attorney General Office of the Attorney General State Tax Commission PO BOX 36 Boise, Idaho 83720-0410	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Fax (208) 334-7844 <input type="checkbox"/> Electronic Court Transmission

  
\_\_\_\_\_  
Samuel A. Diddle

Session: Hansen121709  
Session Date: 2009/12/17  
Judge: Hansen, Timothy  
Reporter: Gosney, Vanessa

Division: DC  
Session Time: 08:24

Courtroom: CR503

Clerk(s):

Olson, Miren

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case number: CVOC08152258  
Plaintiff: Idaho, State of  
Plaintiff Attorney: Delange, Brett  
Defendant: Supply, Native Wholesale  
Co-Defendant(s):  
Pers. Attorney: Diddle, Sam  
State Attorney:  
Public Defender:

2009/12/17

09:04:07 - Operator

Recording:

09:04:07 - New case

Supply, Native Wholesale

09:05:20 - Judge: Hansen, Timothy

Calls case, parties are present and identified - reviews file

09:06:26 - Pers. Attorney: Diddle, Sam

comments - will not move to strike

09:06:43 - Judge: Hansen, Timothy

comment - will not address the motion to strike any further

09:08:56 - Judge: Hansen, Timothy

further comments

09:09:56 - Pers. Attorney: Diddle, Sam

argues the motion to dismiss

09:26:31 - Pers. Attorney: Diddle, Sam

09:26:34 - Plaintiff Attorney: Delange, Brett

argues the motion to dismiss

09:52:22 - Plaintiff Attorney: Delange, Brett

Mr. Spangler - argues the motion to dismiss

09:57:05 - Pers. Attorney: Diddle, Sam

final comments

10:00:50 - Judge: Hansen, Timothy

comments - matter is under advisement

10:01:02 - Operator

Stop recording:

NO  
4.M. FILED P.M. 4:45

Samuel A. Diddle, ISB #4967  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
1111 West Jefferson Street, Suite 530  
P. O. Box 1368  
Boise, ID 83701  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

FEB 22 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Attorneys for Defendant Native Wholesale Supply Company

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through  
LAWRENCE G. WASDEN, Attorney  
General; and the IDAHO STATE TAX  
COMMISSION,

Plaintiff,

vs.

NATIVE WHOLESALE SUPPLY  
COMPANY, a corporation; and Does 1  
through 20,

Defendants.

Case No. CV OC 0815228

DEFENDANT'S  
SUPPLEMENTAL  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO  
DISMISS AND IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION

COMES NOW the Defendant, Native Wholesale Supply Company ("NWS"), by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits its Supplemental Memorandum of Law in Support of its Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction. The Court has recently requested briefing regarding the recent Idaho Supreme Court decision in *Idaho v. Maybee*.

ORIGINAL

*Idaho v. Maybee* was factually and procedurally distinct. From the instant case, however, the legal analysis of the Idaho Supreme Court supports the position of NWS. The opinion in *Maybee* reflects, and the State of Idaho has agreed to stipulate, that the record before the Idaho Supreme Court in *Maybee* established Maybee's sale of cigarettes to Idaho residents who were not enrolled members of a federally recognized Native American Tribe and who were not residing on land within the borders of a federally recognized Tribe's reservation land (hereinafter referred to as "Indian Country"). In stark contrast, in this case, the only sales that exist are sales by NWS to an entity owned exclusively by enrolled members of the Coeur d'Alene Tribe and operating within the boundaries of the Coeur d'Alene Reservation. In *Maybee*, the Idaho Supreme Court observed:

However, contrary to Maybee's contentions, the Acts do not regulate Maybee's on-reservation activities, but rather his off-reservation conduct of: (1) selling, and offering for sale Non-Compliant Cigarettes of Idaho  
...

Here, the regulated conduct occurred off-reservation and so the Bracker balancing test does not apply.

The Supreme Court correctly observed when "on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *See State v. Maybee*, p. 17 (citing *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136, 144 (1980)). In this case, the State of Idaho is asking this Court to do something that the United States Supreme Court has never permitted and has repeatedly rejected, that is, authorizing civil regulation of commercial conduct between tribal members occurring in Indian Country.

As the Court may be aware, this case is one piece of a larger dispute involving applicability or non-applicability of Tobacco Master Settlement statutes in various states to cigarette sales implicating Native Americans. In the underlying settlement with the states and large tobacco manufacturers, large



tobacco manufacturers are entitled to reduce their payments to the states if the states are not aggressively pursuing enforcement of settlement statutes against non-participating manufacturers. See Exhibit “A” to Affidavit of Samuel A. Diddle<sup>1</sup>

In *Grand River Enterprises Six Nations Ltd. v. Government of the United States*, litigation involving the applicability of these statutes was ordered to arbitration. In that arbitration, Grand River Enterprises Six Nations Ltd. and Arthur Montour, Jr., the owner of NWS, submitted expert opinions of Professor Robert Clinton and Professor Matthew Fletcher. Both Professor Clinton and Professor Fletcher are experts in Indian law and policy. Copies of those opinions are submitted hereto as Appendix “A” and Appendix “B.” Professor Fletcher observed:

The two measures at the core of the present dispute were adopted by a majority of states and territories in the United States, including 46 states. Neither of these two measures, by their explicit terms, appears to apply directly to the consumers of the tobacco products made and distributed by the Claimants. Neither the governments imposing these measures or the Respondent appears to consider them to be a tax. These measures were imposed following the conclusion of settlement negotiations arising out of tobacco litigation commenced in the United States by 46 state attorneys general against a group of the largest tobacco companies in the United States. These states each subsequently adopted the measures pursuant to their settlement agreement with these large tobacco companies (the “Master Settlement Agreement” or “MSA”).

Professor Fletcher concluded:

In this context, we would apply the *Williams v. Lee* categorical bar, which states that state regulation is invalid under Federal Indian Law where the state regulation purportedly applies to the on-reservation activities of Indian tribes or reservation Indians. See *Williams*, 358 U.S. at 219-21. It is clear from the facts and representations made by the states that the legal burden of the two measures is on GRE, the wholesaler. GRE, doing business in Indian Country, and selling to tribal purchasers in Indian country, would be immune and exempt from these twin measures that the states seek to impose in the context of tribal sales.

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<sup>1</sup> Exhibit “A” is excerpts from testimony Attorney General Delange provided in a NAFTA arbitration in which he discusses a suit by Idaho against major tobacco companies in which Idaho’s MSA enforcement obligation, if any, to on-reservation tobacco sales will be at issue.

Professor Clinton also reviewed the history of the treaty rights between the United States and tribes, including the Seneca Nation, of which the sole owner of NWS is an enrolled member. He concluded that the prior treaties precluded state regulation of tribal Indian activities in Indian Country by a State and that the United States Supreme Court has consistently recognized this fact:

It should also be emphasized that while the United States Supreme Court has modified prior doctrine to permit limited state *taxation* of tobacco sales to non-Indians in Indian country, the Court has never permitted the direct *regulation* of tribal Indian activities in Indian country by a state. The prior law completely preempting and precluding any such direct regulation remains unaffected by the limited exceptions the court has made for the collection of taxation of non-Indians for purchases in Indian country. The state schemes involved in this Arbitration clearly involve significant *direct regulation* of Indian manufacturers and sellers of tobacco products with the threat to totally *ban* sale of the products of the Haudenosaunee Claimants/Investors if they do not fully comply with the state escrow requirements. Since both the state-enacted listing ban and the state escrow requirements involved state regulatory structures that the states in question seek to directly apply to and enforce against the Indian Claimants/Investors in this case for on-reservation activities, the only conceivable conclusion anyone familiar with domestic American Indian law could draw during the period between 1994 and 2006 is that such state laws could not lawfully be applied to the on-reserve business activities of the Haudenosaunee Claimants/Investors.

See Appendix A at pp. 45-46.

Professor Fletcher summarized the core principles of Federal Indian Law:

United States Federal Indian Law . . . is an amalgamation of centuries of history, law, and policy, much of which is conflicting and very confusing. It has developed over the course of time and many, many tribal histories to stand for three simple propositions. First, Indian tribes retain inherent powers of sovereignty unless expressly abrogated by the United States Congress or through tribal consent in a properly ratified treaty or agreement. See *Felix S. Cohen, Handbook of Federal Indian Law* 122 (1942). Second, the United States federal government retains the exclusive right and power to deal in Indian Affairs. See, e.g., *Johnson v. M'Intosh*, 23 U.S. 543 (1832). And third, state law has no

force in Indian Country, absent the express consent of Congress. *See, e.g., Worcester v. Georgia*, 31 U.S. 515 (1831).

*See* Appendix B at p. 10.

The United States Supreme Court applied a categorical bar to civil regulation of tribal commercial activity on Indian Country in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the State of Montana sought to collect cigarette and personal property taxes from reservation Indians who purchased cigarettes from an on-reservation “smoke shop” owned and operated by tribal members. *See Moe*, 425 U.S. at 467-68. The Court noted that the question whether states had authority to tax the on-reservation activities of reservation Indians had been “[l]aid to rest” in the negative by the Court’s decision in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). *Moe*, 425 U.S. at 476 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). The Supreme Court also refused to allow the State to charge vendor fees to on-reservation Indian vendors.

The United States Supreme Court has repeatedly emphasized the fundamental principle that states may not regulate tribal commercial activity occurring inside Indian Country. In *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, the United States Supreme Court held that Oklahoma could not impose income taxes or motor vehicle taxes on tribal members who lived in Indian Country. The Court stated in part:

But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, “a more categorical approach: ‘[A]bsent cession of jurisdiction or other federal statutes permitting it,’ we have held, a State is without power to tax reservation lands and reservation Indians.” *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687 (1992) (citation omitted). Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d

710 (1976) (tax on Indian-owned personal property situated in Indian country); McClanahan, 411 U.S., at 165-166, 93 S.Ct., at 1258-1259 (tax on income earned on reservation by tribal members residing on reservation).

This categorical bar to such regulations is simply honoring tribal sovereign immunity.

The doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Turner v. United States, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); Santa Clara Pueblo v. Martinez, *supra*, 436 U.S., at 58, 98 S.Ct., at 1677. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine. See, *e.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 et seq. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

*Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 511 (1991).

The Idaho statute the State seeks to apply to NWS sales is categorically barred. In *State v. Maybee*, the regulation was permitted because the sales were not to Indians and not on Indian Country. Any attempt to impose the escrow measure or the complementary listing measure on tribal sales is an attempt to regulate the on-reservation activities of tribal Indians. NWS is an on-reservation wholesaler whose business is directly affected by the measures. NWS's tribal sales are sales to an Indian Country retailer or in other words, on-reservation activities of tribal Indians.

The United States Supreme Court held that a similar categorical bar precludes states from taxing Indian lands and Indian people who are engaged in on-reservation activities. *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 457-59 (1995). The State of Oklahoma sought to impose its motor fuel taxes on a tribal motor fuels retailer operating within Indian Country. *Id.* at 452-53. The Supreme Court noted that in the context of state taxation, it has “held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian Country.” *Id.* at 458 (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976) (state personal property tax); *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973) (state income tax)).

A number of federal district courts have correctly followed the Supreme Court’s prohibition of state regulation of tribal commercial activities on Indian Country. In *Winnebago Tribe of Nebraska v. Morrison*, 512 F. Supp. 2d 1182 (D.Kan. 2007), a federal district court concluded that the State of Kansas could not tax the importation of motor fuels by an Indian tribal corporation located in the State of Nebraska for sale on various Indian reservations located within the State of Kansas. *See id.* at 1185-86.<sup>2</sup> The Kansas Supreme Court interpreted the Kansas motor fuel tax as placing the legal burden of the tax on the “distributor of first receipt,” that is, the tribal corporation located in Nebraska. *See Winnebago Tribe of Nebraska v. Kline*, 150 P.3d 892, 900-02 (Kan. 2007). Under this precedent, the Federal Indian Law’s categorical bar would apply to the activities of reservation Indians *between* reservations.

Another federal district court decision clearly and accurately applied the Supreme Court precedent to regulation of tribal cigarette sales. In *Ward v. The State of New York*, 291 F.Supp.2d 188 (W.D. N.Y. 2003), the district court reviewed the applicability of a New York statute which banned the direct shipment and transportation of certain cigarettes to New York consumers. *Id.* at 193. The district court evaluated three types of transactions:

Based upon the current record, this Court finds that the Statute implicates tribal sovereignty in so far as it restricts or prohibits the following transactions: (a) shipment or transportation of cigarettes by a tribe member from the reservation to a non-tribe member, (b) shipment or transportation of cigarettes by a tribe member from the reservation to another tribe member on the reservation, (c) shipment or transportation of cigarettes from an individual (who may or may not be a tribe member) located off of the reservation to a tribe member located on the reservation.

*Id.*

The court held that tribal sovereignty would not preclude application of the statute to shipment or transportation by a tribe member from the reservation to a non-tribe member. However, with respect to shipment or transportation of cigarettes by a tribe member from the reservation to another tribe member on the reservation, the Court found that the statute could not be applied. The court also held that in the third scenario, shipment by a person located off the reservation to a tribe member located on the reservation, the statute could not be applied. *Id.* The District Court held:

A different question is presented with respect to transactions between tribe members on the reservation. It is well-settled that “[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.” Hicks, 533 U.S. at 362, 121 S.Ct. 2304 (quoting Bracker, 448 U.S. at 144, 100 S.Ct. 2578).

As previously discussed, the Supreme Court has generally upheld state regulation of on-reservation commerce between tribe members and non-tribe members. *See, e.g., Colville*, 447 U.S. at 150-59, 100 S.Ct. 2069; *Moe*, 425 U.S. at 481-83, 96 S.Ct. 1634. However, the Court has been reluctant to allow state regulation of on-reservation commerce between tribe members. *See Moe*, 425 U.S. at 475-79, 96 S.Ct. 1634 (holding that Montana could not collect cigarette sales taxes with respect to on-reservation sales by tribe members to tribe members); *see also Colville*, 447 U.S. at 162-64, 100 S.Ct. 2069 (ruling that Washington’s motor vehicle tax could not be imposed on vehicles owned by tribe members *inter*

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<sup>2</sup> The district court had certified questions of state law relating to the legal incidence of the state motor fuels tax to the Kansas Supreme Court. *See Winnebago Tribe of Nebraska v. Kline*, No. 02-4070, 2005 WL 1683970 (D. Kan. June 30, 2005).

*alia* because tax was not “tailored ... to the amount of actual off-reservation use ...”).

*Id.*

The United States Supreme Court and other courts following its rulings have repeatedly refused to allow state regulation of tribal commercial conduct occurring on Indian Country. In *State v. Maybee*, the Idaho Supreme Court allowed regulation of tribal commercial conduct because it occurred off reservation. Clearly, that is not the case here.

Furthermore, *State v. Maybee* is procedurally distinct from our case. In *State v. Maybee* the Court was ruling upon a motion for summary judgment regarding the applicability of the Complementary Act to Maybee’s sales to Idaho residents. The case did not involve a challenge to the Court’s jurisdiction. Clearly jurisdiction existed in *Maybee* because Maybee sold and shipped cigarettes to Idaho citizens who were not enrolled members of federally recognized tribes and were not residing on Indian Country. Here, there is no such contact with the State of Idaho. Rather, any contacts by NWS are solely with enrolled members of the Coeur d’Alene Tribe on the Coeur d’Alene Reservation. Activities taking place solely on Indian Country do not constitute contacts with the forum state. *Flammond v. Flammond*, 621 P.2d 471 (Mont. 1980); *Martinez v. Superior Court*, 731 P.2d 1244, 1246 (Az. App. 1987).

Finally, the State’s current motion before this Court is a motion for a preliminary injunction, not a motion for summary judgment. As set forth in prior briefing, the State has failed to meet its burden under Idaho Rule of Civil Procedure 65.

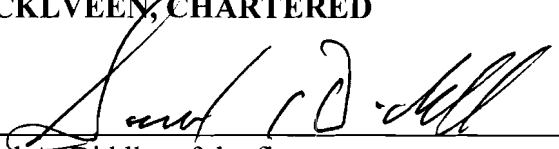
### **CONCLUSION**

The distinction between *State v. Maybee* and the case before this Court is the simple fact that Maybee sold to Idaho citizens not residing on Indian Country, unlike the facts of NWS. This distinction

is controlling and justifies entry of an order dismissing Plaintiffs' Complaint and denying Plaintiffs' request for a preliminary injunction.

DATED this 22 day of February, 2010.

**EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED**

By   
Samuel A. Diddle, of the firm  
Attorneys for Defendant Native Wholesale  
Supply Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney this 22 day of February, 2010, as indicated below and addressed as follows:

Lawrence G. Wasden Attorney General State of Idaho Brett T. DeLange Deputy Attorney General Consumer Protection Division Office of the Attorney General Len B. Jordan Building 650 W. State Street, Lower Level PO Box 83702 Boise, Idaho 83702-0010	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax (208) 334-4151 <input type="checkbox"/> Electronic Court Transmission
Theodore V. Spangler, Jr. Deputy Attorney General Office of the Attorney General State Tax Commission PO BOX 36 Boise, Idaho 83720-0410	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax (208) 334-7844 <input type="checkbox"/> Electronic Court Transmission

  
Samuel A. Diddle



# **APPENDIX**

## **A**

**UNDER THE ARBITRATION RULES OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

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**BETWEEN:**

**GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,  
JERRY MONTOUR, KENNETH HILL AND ARTHUR MONTOUR, JR.**

**Claimants / Investors**

**- AND**

**GOVERNMENT OF THE UNITED STATES OF AMERICA**

**Respondent / Party**

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**EXPERT OPINION REPORT OF PROFESSOR ROBERT N. CLINTON  
ON BEHALF OF THE CLAIMANTS/INVESTORS**

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## **Expertise**

Robert N. Clinton currently holds the Foundation Professor of Law chair at the Sandra Day O'Connor College of Law at Arizona State University where he teaches in the Indian Legal Program. He also serves as an Affiliated Faculty Member of the Indian Studies Program of Arizona State University. Among the various courses he has taught are the History of Federal Indian Policy, Federal Indian Law I and II, Indian Gaming Law, Tribal Law and Government, Constitutional Law I and II, and Federal Courts. Professor Clinton taught law for 35 years. During that entire period, his primary area of specialization has been federal Indian law and the history of United States Indian policy, including the formative early colonial experience under British rule. Before joining the law faculty of the Sandra Day O'Connor College of Law at Arizona State University, Professor Clinton taught for 27 years at the University of Iowa College of Law where he served as the Wiley B. Rutledge Professor of Law and as a founding and Affiliated Faculty member of the Indian Studies Program. He has also taught as a visiting professor at the University of Michigan Law School, Cornell Law School and the University of San Diego Law School.

After receiving a B.A degree from the University of Michigan in 1968 with a major in political science, Professor Clinton received his J.D. degree in 1971 from the University of Chicago Law School, where he graduated at the top of his law school class. After a brief legal practice career with the law firm then known as Devoe, Shadur and Krupp in Chicago, Illinois, Professor Clinton entered the legal academe in 1973. He is admitted to practice in the bars of the States of Illinois and Iowa, the Ak Chin Community Court, the United States District Courts for the Northern and Southern Districts of Iowa and the Northern District of Illinois, the United States Court of Appeals for the Seventh and Eighth Circuits and the United States Supreme Court.

Professor Clinton also serves as the Chief Justice of the Winnebago Tribe of Nebraska and as an

Associate Justice on the Colorado River Indian Tribes Court of Appeals, the Hualapai Tribal Court of Appeals, and the Cheyenne River Sioux Tribal Court of Appeals. He has also served as a temporary judge for other tribes and has served as an arbitrator on tribally-related matters under the auspices of the American Arbitration Association. References to the governmental bodies that employ this Expert are for identification purposes only. The views and opinions, however, expressed in this Expert Opinion Report are solely those of the author based on his scholarly expertise in the field and do not reflect the official views of any of the governmental bodies that employ him.

Professor Clinton is the co-author of *Felix Cohen's Handbook of Federal Indian Law* (1982 ed), one of the leading treatises in the field of Indian law, and of numerous editions of an Indian law casebook now known as *American Indian Law: Native Nations and the Federal System* (5<sup>th</sup> ed. 2007) as well as accompanying annual statutory supplements. Professor Clinton is the primary author and co-editor of *Colonial and American Indian Treaties*, a CD-ROM collecting and explaining colonial and United States treaties with the Indian tribes of the United States.

Over the course of his career, Professor Clinton has authored over 25 articles on questions of federal Indian law and policy, federal courts, and United States constitutional law. A complete copy of Professor Clinton's CV is attached to this opinion as Appendix A. Many of his articles focus on the colonial and early nineteenth century relationship between Great Britain, and later, the United States and the Indian tribes of the eastern Americas, including especially the five tribes composing the Haudenosaunee (variously also known as the Five or Six Nations or the Iroquois Confederation). In particular, he has written about British colonial Indian policy and the early formation of and constitutional limits involving the political relationship between the United States government and the tribes of North America. Copies of the most relevant articles are attached to this Opinion as Appendices B, C, and D.

**Facts:**

The individual Claimants in this proceeding are all members of tribes that are part of the Haudenosaunee Confederation (sometimes referred to as the Iroquois Confederation). These claimants were all were born in Canada. See Particularized Statement of Claim ¶3 (June 30, 2005). Claimant Kenneth Hill is a recognized member of the Six Nations of the Grand River First Nation, an aboriginal First Nation in Canada, and Claimant Jerry Montour is a recognized member of the aboriginal community on the Wahta Mohawk Reservation, also an aboriginal First Nation in Canada. *Id.* The other individual Claimant, Arthur Montour, is a recognized member of the Tonawanda Band of Seneca Indians, a United States Indian Nation. *Id.* The Six Nations of the Grand River First Nation, the Wahta Mohawk Reservation First Nation, and the Tonawanda Band of Seneca are surviving aboriginal communities of the Haudenosaunee.

The Claimants manufacture and distribute tobacco products. *Id.* at ¶ 6. This Expert is informed that the tobacco products that the Claimants manufacture for sale in the United States, either outside or inside of the reservation lands of sovereign Indian tribes within the United States, bear the “Seneca” brand or the “Opal” brand, primarily the former. See *id.* At ¶ 24.

Kenneth Hill and Jerry Montour are co-owners of, and control, Grand River Enterprises Six Nations Ltd. (GRE), the manufacturing arm of their co-venture with Arthur Montour, the Claimant who is a member involved in this dispute, “GRE.” Decision on Objections to Jurisdiction ¶ 2 (July 20, 2006). GRE’s manufacturing facilities are located on sovereign Haudenosaunee territory controlled by Canada. *Id.* GRE is the exclusive manufacturer of the Seneca brand. See Particularized Statement of Claim ¶ 23 (June 30, 2005). This Expert is also also informed that GRE also constitutes the exclusive manufacturer of the Opal brand and that GRE holds all of the trademark rights registered in the United States with the United States Patent and Trademark Office upon which the Opal brand is based.

Arthur Montour owns and controls the distribution arm of the Claimants’ collective enterprise, Native Wholesale Supply (NWS). NWS operates and is located on sovereign Seneca territory located in the United States. Decision on Objections to Jurisdiction ¶ 2 (July 20, 2006). NWS holds all of the trademark rights registered in the United States with the United States Patent and Trademark Office upon which the Seneca brand is based. Particularized Statement of Claim ¶ 24 (June 30, 2005). NWS is

the exclusive distributor of the Seneca and Opal brands, for sales on Indian reservation<sup>1</sup> lands located within the United States. *Id.* at ¶ 23.

This Expert is informed that the cigarettes manufactured by GRE are produced and sold in one of three ways: (1) sales of Seneca and Opal branded products, through NWS, to Indians and Indian enterprises on sovereign tribal lands located within the territorial limits of the United States (“on reserve sales” or “tribal sales”), Particularized Statement of Claim ¶¶ 22, 26 (June 30, 2005); (2) sales of Seneca branded products in selected markets within the United States not located on tribal lands (“off reserves sales” or “off reservation sales”), *id.*; and (3) the production of tobacco products bearing third party brands under contract to third parties located off-reserve within the United States (“private label production”). This Expert understands that such third party distributors do not purchase or sell Seneca branded tobacco products, or engage in any sales on Indian reservation lands located within the United States.

Tribal sales on-reserve constituted the earliest part of the Claimants’ business enterprise. That business commenced in 1994; continued with establishment of the Seneca brand in 1997; and continues to this day. By contrast, off-reservation sales only started in 2002, again through the Claimants establishing and promoting their Seneca brand of products. The Claimants began establishing their brand off-reservation because they realized that they could compete profitably in a regional market under the measures described herein. Statement of Claimants’ Claims Arising Directly Out of the Adoption and Implementation of the Allocable Share Amendments ¶¶ 51-62 (Nov. 6, 2006).

The two measures at the core of the present dispute were adopted by a majority of state and territorial governments in the United States. They do not constitute taxes under either United States law or within the NAFTA treaty regime. Neither of these two measures, by their explicit terms, applies to the consumers of the tobacco products made and distributed by the Claimants.<sup>2</sup> These measures were the result of the settlement of tobacco litigation in the United States and were separately adopted by 46 different states within the United States pursuant to their settlement agreement (the “Master Settlement

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<sup>1</sup> In Canada reserved tribal aboriginal lands tend to be called reserves. American legal authorities tend to employ ‘reservation lands’ or ‘Indian country’, a defined legal term of art, the definition of which is set forth in 18 U.S.C. § 1151. This opinion will employ the terms reservation, reserve, and Indian country interchangeably to refer to recognized aboriginal lands held either directly by or in trust for aboriginal Indian tribes or First Nations. Insofar as the United States on reserve distribution of the tobacco products involved in this dispute is concerned, all distribution took place within Indian country, as defined in 18 U.S.C. § 1151.

<sup>2</sup> However, this Expert understands that under the MSA itself, participating states did purport to bind themselves to consider “Indian Country or Indian Trust Land” as part of their geographic territory for purposes of performance of the terms of the Agreement. See Transcript of Jurisdictional Hearing at pages 0604-0606.